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## LEGAL AID 1900 TO 1930: WHAT HAPPENED TO LAW REFORM?

MARK SPIEGEL\*

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*This article offers a counter narrative to the conventional description of legal aid in the United States. By offering this counter narrative it focuses us on certain enduring difficulties that any legal aid or legal services program has to face if it wants to engage in reform efforts: problems of funding and problems of the social and historical context. Conventional wisdom has it that legal aid until the 1960s was largely devoted to individual cases and that it was not until the advent of federally-funded legal services that law reform and social change became part of the delivery of legal services to the poor. Contrary to this conventional wisdom, there is another story. As this article demonstrates, there was an aspiration toward using the legal system aggressively to achieve social justice during the period 1900 to roughly 1920. This changed during the 1920s.*

*In presenting this counter-narrative, this article first looks at legal aid during the period 1900-1920 to support the thesis that during this period legal aid aspired toward using the legal system to achieve social justice. It then looks at that next decade, the 1920s, and describes how legal aid became the kind of organization that conventional wisdom describes: a legal aid organization devoted almost solely to individual cases with a large focus on domestic relations practice and abandoning any attempt to use law to achieve social justice. More importantly, this article explores why*

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\* Professor of Law, Boston College Law School. I was a Reginald Heber Smith Fellow from 1969-1971. I wish to thank Carrie Menkel-Meadow, Mark Aaronson, Paul Tremblay, Mary Bilder, Brain Galle and Joe Liu for their comments on an earlier draft. This article received generous support from the Boston College Law School Summer Research Grant program.

*this change to a more traditional type of legal aid occurred. The most interesting theories blame Reginald Heber Smith and the American Bar Association. Smith is blamed because of his alleged emphasis on access to justice in a landmark study of legal aid called "Justice and the Poor" published in 1919. The ABA is blamed because of the alleged "takeover" of legal aid by the conservative bar in the 1920's, enabled by the ABA's establishment of a standing committee on legal aid. These theories, however, are too reductionist and overlook two more important explanations for this retreat from law reform: the need for funding and the social and historical context. These explanations are significant not only because they shed light on a neglected part of our past, but because they connect that past to issues that persist until today.*

## INTRODUCTION

Federal funding for civil legal services at the national level is fifty years old.<sup>1</sup> Provision of such funding seems to have reached the stage of being broadly acceptable despite efforts over the years to eliminate funding.<sup>2</sup> Its scope and purpose, however, re-

<sup>1</sup> In November, 1964 Sargent Shriver, Director of the Office of Economic Opportunity announced the intention to create a network of social service agencies which would include legal assistance for the poor. See EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 49-50, (1974). Actual funding took place over the next several years. *Id.* at 82-99. In 1974 the Legal Services Corporation took over the funding of legal services programs. See Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 STAT. 378 (1974).

<sup>2</sup> By being acceptable I mean that although there remain important limitations on the scope of legal services, see *infra* note 6, the efforts to defund it totally have largely abated. For discussion of efforts to defund legal services see Stuart Taylor, Jr., *New Rules on Legal Aid: Two Views*, N.Y. TIMES, Dec. 24, 1983, at A9 (discussing Reagan Administration attempts to eliminate funding for legal services and its imposition of restrictions on the spending of grants); Editorial, *Make Legal Services Legal*, N.Y. TIMES, June 1, 1983, at A22 (criticizing the Reagan Administration for its selection of individuals hostile to the Legal Services Corporation for positions on its board and, additionally, for its refusal to seek Senate confirmation for these recess appoint-

main contested issues. For some, the goal of federally funded legal services is simply to provide access to court. For them, efforts to engage in law reform are considered not only ill advised, but also illegitimate.<sup>3</sup> For others, an essential part of providing civil legal services is to achieve social justice. In, order to accomplish this goal, legal services organizations must be able to engage in law reform efforts.<sup>4</sup> As Joel Handler in his history of the early days of the formation of Office of Economic Opportunity (OEO) Legal Services described it, a legal services program providing aggressive legal rights “would stress social change through litigation,” whereas a program providing traditional legal rights would be concerned simply with providing a lawyer to insure access to court.<sup>5</sup> Today, this division over the proper scope of legal services is illustrated by the fact that federal funding of legal services comes with significant restrictions on the scope of the work of legal services lawyers, such as limitations

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tees); See also Editorial, *Insult to the Poor, and the Constitution*, N.Y. TIMES, Dec. 13, 1982, at A22 (“Mr. Reagan, unable to persuade Congress to scrap Legal Services altogether, has installed recess appointees who aim to cripple the program.”).

<sup>3</sup> For early critiques of legal services’ focus on law reform, see Geoffrey C. Hazard, Jr, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969) and Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281(1982).

<sup>4</sup> See Richard Abel, describing the dominant “image of legal aid as equal access to law,” Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 487 (1985). However, Abel also acknowledges that focusing on substantive justice was a prominent alternative conception “with a lengthy pedigree.” *Id.* at 491; Stuart A. Scheingold, *The Dilemma of Legal Services reviewing Jack Katz, Poor People’s Lawyers in Transition*, 36 STAN. L. REV. 879, 879-80 (1984) (describing controversy about goals of legal services as whether it should simply continue traditional legal aid or contribute more directly to reform by reducing poverty). See also Deborah L. Rhode, *Equal Access to Law*, 69 FORDHAM L. REV. 1785, 1786-87 (2001) (discussing contradictions in the term access to justice and whether it is the equivalent of equal justice).

<sup>5</sup> Joel Handler, *United States of America*, in PERSPECTIVES ON LEGAL AID: AN INTERNATIONAL SURVEY 326-328 (Frederick H. Zemans ed., 1979).

on class actions, lobbying, mounting legal challenges to welfare laws and representing certain clients, such as most non-citizens.<sup>6</sup>

These questions about the proper scope of legal services are not new; they were present at the initial stages of the founding of legal aid organizations in this country.<sup>7</sup> By examining this founding era and particularly the period from 1900 to 1930, this article provides an enhanced understanding of the environment legal aid or legal services operates within and the limitations that are inherent in the enterprise. It also helps us understand issues faced by any type of lawyering that hopes to achieve social change, whether it is called legal aid, legal services, public interest lawyering or cause lawyering.<sup>8</sup>

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<sup>6</sup> The current restrictions include limitations on legislative and administrative advocacy, ability to contest State and Federal welfare rules, representation of resident aliens and incarcerated individuals, participation in class actions and abortion litigation, and authority to support assisted suicide in any way. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §504, 110 Stat. 1321-53, et seq. (1996); 45 C.F.R. pts. 1610-15, 1617, 1626, 1632-33, 1636-40, 1642-43 (2001). See generally Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L. J 1213 (2002). In *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2000), the U.S. Supreme Court struck down the restrictions upon challenging welfare reform laws. Congress subsequently withdrew much of this limitation, but it continues to proscribe advocacy of welfare reform that is not connected to representation of a client. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, 115 Stat. 794-95 (2001). At one time there were restrictions on the ability of legal services programs to ask for attorney's fees. In 2009 Congress removed this restriction. See FY 2010 Consolidated Appropriations Act (, Pub. L. 111-117, 123 Stat. 3034 (2009). For a comprehensive list of current restrictions, see <http://www.lsc.gov/media/fact-sheets/about-statutory-restrictions-lsc-funded-programs>.

<sup>7</sup> Kenneth W. Mentor and Richard D. Schwartz, *A tale of Two Office: Adaptation Strategies of Selected LSC Agencies*, 21 JUST. SYS. J. 143, 145 (2000) (The question about whether "lawyers for the poor [should] address systemic problems, in a cause oriented role, or limit themselves to the representation of individual clients" goes back to the end of the nineteenth century.)

<sup>8</sup> Scott Cummings discusses the change in labeling of social change lawyering from public interest law to cause lawyering in Scott L. Cummings, *The Pursuit Of Legal Rights—And Beyond*, 59 UCLA L. REV. 506, 516-522 (2012).

Most accounts of legal aid before the advent of federal funding by the Office of Economic Opportunity in 1966 have presented “traditional” legal aid organizations as basically regressive. In these accounts, these organizations largely restricted their representation to domestic relations, viewed providing legal services as charity and did not regard reform as a legitimate part of their agenda. For example, Alan Housman and Linda Perle, in their history of legal aid, state that prior to 1965 “most legal aid programs only provided services in a limited range of cases and only to those clients who were thought to be among the ‘deserving poor’ (i.e. those facing legal problems through no fault of their own).”<sup>9</sup> What is interesting about these accounts is not the conclusions they draw about legal aid as it was during

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<sup>9</sup> Alan W. Housman and Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States* 3 (2003). They go on to say that “[i]n the early 1960s, a new model for civil legal assistance for the poor began to emerge. This model was influenced by the “law reform” efforts of organizations such as the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund and the American Civil Liberties Union (ACLU), which had successfully used litigation to produce changes in existing law.” *Id.* at 4. See also Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, 10 (1993) (“[u]ntil the 1960s practicing poverty law meant little more than giving routine legal advice to poor people”); Deborah Rhode, *Access to Justice* 60-63 (2004) (describing the transition from conservative legal aid to the law reform efforts of the 1960s as one of continuity in the pre-1960s period); Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 Wis. L. Rev. 1121, 1127 (1996) (Legal aid model emphasized service to individuals rather than changing the law, but a more aggressive model of lawyering for the poor and disadvantaged grew out of the civil rights movement and began to compete with the traditional legal aid model of individual service in the 1960s); Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 Loy. J. Pub. Int. L. 11, 14 (2003) (contrasting legal aid’s emphasis on individual clients with the law reform emphasis of settlement houses in the early 1900s); NLADA, *History of Legal Aid*, [http://www.nlada.org/About/About\\_HistoryCivil](http://www.nlada.org/About/About_HistoryCivil) (last accessed 11/22/2013) (Until 1960s “[l]egal assistance was viewed as a form of charity, and clients deemed not to be among the “deserving poor” were turned away. Services were provided on a purely individual basis, with no effort to address the fundamental problems of poor people.”).

the early 1960s—these depictions appear to be accurate<sup>10</sup>—but that they present their depiction of legal aid as if that was the way it always had been—a story of continuity.

There is, however, another story. There was a period when some legal aid organizations pursued a more progressive, social justice law reform agenda, which included not only “test” cases, but also legislative and community education efforts.<sup>11</sup> This was roughly during the period 1900 to 1920. A shift, however, appeared to occur during the 1920s when legal aid, rather than building on the agenda of the previous decades, solidified the characteristics that the critics identified, in particular abandoning any attempt at pursuing law reform.

In this article, I first examine the evidence supporting this shift in the direction of legal aid during the 1920s. I then consider what explains it. Phillip Merkel makes Reginald Heber Smith a primary culprit for the change in direction in legal aid during the 1920s.<sup>12</sup> Smith was the author of a landmark study of legal aid, *Justice and the Poor*, which was published in 1919.<sup>13</sup> Although I agree that *Justice and the Poor* was influential in shaping legal aid during the 1920s, I argue that while Smith’s writings and in particular, *Justice and the Poor*, can be read to exalt individual representation over law reform, they also can be

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<sup>10</sup> A study done by the Russell Sage Foundation that was published in the 1960s concluded that 3 out of 4 accepted applicants for legal assistance received only brief consultation and that many of the offices were incapable of handling cases that require extensive investigation or time-consuming litigation. J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR 50 (1967). See also SUSAN LAWRENCE, THE POOR IN COURT 20-21 (1990) discussing the limitations of legal aid work in the 1950s and early 1960s.

<sup>11</sup> See JACK KATZ, POOR PEOPLE’S LAWYERS IN TRANSITION (1982); Philip L. Merkel, *At the Crossroads of Reform: The First Fifty Years of American Legal Aid, 1876-1926*, 27 HOUSTON L. REV. 1 (1990); and Mark Spiegel, *The Boston Legal Aid Society: 1900-1925*, 9 MASSACHUSETTS LEGAL HISTORY 17 (2003).

<sup>12</sup> Merkel, *supra* note 11, at pp. 5, 33-35.

<sup>13</sup> REGINALD HEBER SMITH, JUSTICE AND THE POOR 134-138 (3rd Ed. 1924). [hereinafter Smith, *Justice and The Poor*].

read to support law reform efforts.<sup>14</sup> Besides Smith, the other major culprit in previous accounts explaining this shift away from law reform is the bar. It is argued that the American Bar Association (ABA) beginning in about 1920 co-opted legal aid and stifled its more progressive impulses.<sup>15</sup> I consider this argument and reject the conclusion that the ABA's influence was the primary determinant of the direction of legal aid during the 1920s.<sup>16</sup>

This article argues that contrary to the accounts that place Smith and the ABA at the forefront of the reasons for legal aid abandoning law reform efforts, there are other more significant explanations for the direction legal aid took: economic pressures and the changing social and historical context within which the legal aid societies operated. From the beginning, legal aid struggled to find ways to sustain itself. To the extent that the bar was viewed as the major solution to this financial dilemma, legal aid needed to appeal to its funding source and hence shape its agenda in ways it thought would be appealing to the bar. In addition, legal aid, as a participant in the legal system, was subject to the same social forces that shape our legal system and therefore adopted the characteristics of the times. The 1920s were not the same as the Progressive pre-war era; hence, the other primary reason for the abandonment of most law reform efforts during the 1920s was the context. In making this argument I do not intend to absolve Smith or the ABA from any responsibility for the direction legal aid took during the 1920s. However, I do intend to focus attention on forces that still persist – funding and the social and historical context.<sup>17</sup>

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<sup>14</sup> See *infra*.

<sup>15</sup> See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 59-61(1976); Merkel, *supra* note 11, at 5. See also the argument of Scott Cummings discussed in Cummings, *infra* note 183.

<sup>16</sup> See *infra*.

<sup>17</sup> Another version of this story is told by Michael Grossberg. He places the development of legal aid and its inability to ever achieve social change as an inevitable consequence of the ideology of political liberalism. Michael Gross-



I start by focusing primarily on the early history of legal aid organizations, during the period 1900 to 1920, in three cities: Chicago, Boston and New York. I have chosen these three organizations because they were among the earliest<sup>18</sup> and the most

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berg, *The Politics of Professionalism: the Creation of Legal Aid and the Strains of Political Liberalism in America, 1900-1930*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM* 305. (TERENCE C. HALLIDAY AND LUCIEN KARPIK ED., 1997). He argues legal aid was part of the politics of professionalism and representative of the bar's struggles to maintain autonomy and its place in "the American liberal legal order." *Id.* I have not focused on Grossberg because his version of legal aid is more one of continuity. His history is not interested in the possibility of change during the period. I am interested in the changes that may have occurred and exploring what might account for them.

<sup>18</sup> According to most accounts, the first organized legal aid organization in this country was started in New York in 1876. See e.g. SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at 134-135; Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 *LOY. J. PUB. INT. L.* 11, 12 (204 ("[Earliest legal aid society was established in New York City in 1876"]). For an early history of the New York Legal Aid Society see JOHN M. MAGUIRE, *THE LANCE OF JUSTICE* (1928). Recently Felice Batlan has questioned this genealogy and argued the origins of legal aid are with women's organizations such as New York City's Working Woman's Protective Union. Felice Batlan, *The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in New York City, 1863-1910*, 28 *LAW & HISTORY REVIEW* 931, 970 (2010). See also, Felice Batlan, *Legal Aid, Women Lay Lawyers, and the Re-writing of History, 1863-1930* in *FEMINIST LEGAL HISTORY* 173 (TRACY A. THOMAS AND TRACEY JEAN BOISSEAU ED. 2011). Others have credited the Freedmen's Bureau a Federal agency that was formed to represent newly freed slaves in the District of Columbia and some Southern states. See LAWRENCE, *supra* note 10, at 18. To some extent some of this debate depends upon how you define a legal aid organization and whether it is necessary that the organization be open to all income qualified applicants or whether it can be restricted by gender or race. See EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* 7 (1951) stating that the New York Legal Aid Society as originally constituted was not "Legal Aid as now conceived because its clientele was restricted to a special group." See also SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at 135 (New York at first was not a legal aid society within the modern meaning of the term because it just represented German immigrants). Regardless of whether Professor Batlan is correct about parentage, she is correct about too little attention given to these early women's legal aid organizations in the standard histories of legal aid. However, whether these "revisionist" accounts are accurate, for my purposes what is important is that the

influential of the early legal aid organizations.<sup>19</sup> I also look at the national legal aid organization founded in 1911, the National Alliance of Legal Aid Societies. In the second section of this article, I look at the same organizations during the 1920s — Chicago, Boston, New York and the National Association of Legal Aid Organizations, the successor to the National Alliance of Legal Aid Societies. Finally, because I conclude that there was a shift in the work of legal aid during the 1920s, the third and fourth sections of this article explore the reasons why. As part of this exploration, I look at the influence of Reginald Heber Smith and his study of legal aid, *Justice and the Poor*, the ABA and, as stated above, issues of funding, and social and historical context.

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New York Legal Aid Society was viewed by subsequent legal aid organizations as the first legal aid society. Chicago is usually viewed as the second legal aid organization and depending upon whose account you accept Boston was the third or fourth. SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at 135-136, 140-141.

<sup>19</sup> New York Boston and Chicago by being among the earliest legal aid organizations served as models for other legal aid societies. See SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at 140 (discussing how other legal aid societies looked to New York for guidance). The influence of the legal aid organizations of New York, Boston and Chicago was also reflected in the stature accorded to their leaders. Arthur von Briesen the President of the New York Legal Aid Society from 1890 to 1916. He was considered the father of the legal aid movement, See William E. Walz, *Legal Aid Societies: Their Nature, History, Scope, Methods and Results* speech reprinted in 12 *LEGAL AID REVIEW* No. 3 at 2 (July, 1914). Von Briesen was elected the First President of the National Alliance of Legal Aid Societies. Although the early leaders of the Boston Legal Aid Society may not have been influential, Reginald Heber Smith who was Boston's Director from 1914 to 1919 became the spokesperson for the legal aid movement, partially because of his work in Boston and then subsequently because of the publication of *Justice and the Poor*. But his importance to the legal aid movement predated publication of *Justice and the Poor* as illustrated by his prominence at the meetings of the National Alliance including his important speech on preventive law. See *infra* note 58. Rudolph Matz was the President of the Legal Aid Society of Chicago during most of the period 1900-1920. He, too, was a prominent spokesperson during this period being featured at the meetings of the National Alliance. For example see the speech discussed *infra* note 37.

Before beginning this exploration, there are some preliminary issues that need to be addressed. First, I do not mean to suggest that law reform is equivalent to achieving social justice. Whether law reform is the best or even an effective approach to achieving social justice is a complicated question, one that is beyond the scope of this article.<sup>20</sup> My own view is that law reform, by itself, cannot achieve significant social change. It takes political action to translate legal victories into effective reform. I do believe, however, that legal action, at certain times, can be helpful in putting issues on the agenda or creating opportunities for reform. For the purposes of this article, the question is whether achieving reform was part of the agenda of legal aid and not the more difficult question of what strategies or methods are the most effective at achieving social change.<sup>21</sup>

Second, I frequently use the annual reports of these legal aid organizations to support the propositions I am advancing. To rely on these reports introduces the possibility of distortion. The annual reports were written not only for the purpose of giving

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<sup>20</sup> This question of the effectiveness of law reform efforts has been discussed at several different levels. One is whether Supreme Court decisions are agents of social change. This question has been most extensively discussed in relation to the impact of *Brown v. Board of Education*. See e.g. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2ND ED. 2008); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004). But see Tim Lytton, making a case for the power of civil litigation as a strategy to address pressing social problems in TIM LYTTON, *HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY ABUSE* (2008). A related question is to what extent lawyers advocating for social change should rely on litigation and law reform efforts. For the purposes of this article this second question is more germane. For a review of the literature and a discussion of some of the empirical questions that need to be explored see Scott L. Cummings, *Empirical Studies Of Law and Social Change: What Is The Field? What Are The Questions?*, 2013 WISC. L. REV. 171 (2013). See also the discussion in Scott L. Cummings and Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L. J. 603 (2009).

<sup>21</sup> As noted above, see *supra* page , I define reform broadly to include not only litigation, but legislative efforts and community education.

an account of the work, but also to appeal to potential donors. The kinds of accounts that might appeal to donors might be different from the actual work performed. Moreover, annual reports are at best an imperfect reflection of the total work of an organization. Nevertheless, these accounts seem useful not only for telling us what the legal aid organization believed might appeal to donors, but also for telling us about the attitudes of the organization. Even if not totally representative, the accounts of the work in annual reports are the best descriptions readily available.

Finally, there is always the difficulty of attributing cause and effect or motive to events that occurred at a different time and the related problem of assuming that the events that occurred in a different context can be lessons for today; however, the dilemmas that funding and social and historical context present to a legal aid organization persist.<sup>22</sup> The way in which these issues arise and the “solutions” presented may vary, but the influence of funding and the importance of the historical and social context are constants. Understanding the persistence of these forces helps us understand both the potential and limitations of providing publically funded legal services.

## I. LEGAL AID: 1900-1920

In this section I look at the work of legal aid societies in Chicago, Boston, and New York during the period 1900 to 1920. I also look at the work of the National Alliance of Legal Aid Societies, founded in 1911. My major goal, as stated above, is to determine whether these organizations embraced efforts to reform the law, either through litigation or legislation.

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<sup>22</sup> For example, see the argument of Gary Bellow that the Legal Services Corporation adopted a strategy of maximizing funding by emphasizing the number of clients it could represent rather than reform efforts. Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REVIEW 337, 340-41 (1980).

### A. *Chicago*

Legal aid in Chicago started in 1886. The Chicago Woman's Club established the Protective Society for Women and Children. The Protective Society's original goal was to protect young women who were offered employment from debaucheries and seductions.<sup>23</sup> This work, however, expanded beyond this initial goal into representation of all legal issues involving women and children. Two years later, in 1888, members of the Chicago Ethical Cultural Society founded the Bureau of Justice to provide legal services to the poor and unfortunate. In 1905, a merger of the Bureau of Justice and the Protective Society created the Legal Aid Society of Chicago.<sup>24</sup>

Both of these original organizations, the Protective Society and the Bureau of Justice, had law reform as an objective. Originally the Protective Society's sole concern was sexual exploitation, but it also addressed economic exploitation that might stem from poverty and social class injustice.<sup>25</sup> In addition, around the turn of the century, it began lobbying for passage of legislation that addressed both of these concerns. It lobbied for legislation that was concerned with wage claims and problems of chattel mortgages,<sup>26</sup> as well as legislation to strengthen the punishment of rape and child molestation.<sup>27</sup> The Bureau of Justice's original mandate was to remedy issues concerning "justice to the poor." In fulfilling this mandate, it used reform tactics, such as

<sup>23</sup> See generally D.S.B. Conover, *Chicago Protective Society for Women and Children*, 8 THE CHARITIES REVIEW 287, 287 (1898). See also SMITH, JUSTICE AND THE POOR, *supra* note 13, at 135; KATZ, *supra* note 11, at 34-35.

<sup>24</sup> KATZ, *supra* note 11 at, 35-36.

<sup>25</sup> Gwen Hoerr Jordan, "Them Law Wimmin" *The Protective Agency for Women and Children and the Gendered Origins of Legal Aid* 156 in FEMINIST LEGAL HISTORY, *supra* note 18, at 157-58 (2011) discussing how the Protective Agency for Women and Children used law reform to secure women's substantive equality. Jordan also argues the Protective Society provided a model for what today is called cause lawyering.

<sup>26</sup> *Id.* at 162.

<sup>27</sup> *Id.* at 163.

publicizing outrageous conditions and drafting legislation, as well as mounting lobbying campaigns for passage of that legislation.<sup>28</sup>

The Legal Aid Society of Chicago continued these traditions. It had three goals or objectives: (1) “[t]o assist, in securing legal protection against injustice for those who are unable to protect themselves”, (2) “[t]o take cognizance of the workings of existing laws and methods of procedure and to suggest improvements”, and (3) “[t]o propose new and better laws and to make efforts toward securing enactment.”<sup>29</sup> Although the first of these objectives is focused on individual representation, the other two point toward law reform. The question, however, is not only whether law reform was part of the espoused goals of the Legal Aid Society, but to what extent this goal was reflected in the work of the Legal Aid Society.

According to the annual reports and bulletins issued in this period, law reform via legislative efforts was a prominent feature of the Legal Aid Society’s work. The Fifth Annual Report in 1910 was a review of the work “which [the] consolidated organization [had] been doing for four years and a half, and which [its] constituent parts, the Protective Society for Women and Children, and the old Bureau of justice, carried on separately so many years before [it] came together.”<sup>30</sup> In this review, legislative reform is featured prominently.<sup>31</sup> The President of the Legal Aid Society, Rudolph Matz, states “since its organization [the Legal Aid Society] has from time to time been instrumental in drafting and proposing to the Legislature of our state bills . . . to meet a condition or situation in the lives or experiences of the particular objects of our work, that the then existing laws or ab-

<sup>28</sup> KATZ *supra* note 11, at 36; Jordan *supra* note 25, at 167.

<sup>29</sup> By-Laws of Legal Aid Society of Chicago, Sec. 2 reprinted in SECOND ANNUAL REPORT, LEGAL AID SOCIETY OF CHICAGO 31 (1907).

<sup>30</sup> Fifth Annual Report, Legal Aid Society of Chicago 7 (1910).

<sup>31</sup> In the Fifth Annual Report it occupies two of the five narrative pages discussing the work of the Society. *Id.* at pp. 8-9.

sence of laws did not meet.”<sup>32</sup> He then cites a number of examples such as a “Crimes Against Children” bill, a “Personal Property Brokers” bill and a “Wage Assignment” bill. The discussion of the “Personal Property Brokers” bill is particularly instructive in illustrating how the reform work was not simply happenstance, but self-conscious. It describes how the attorney who was responsible for this legislation visited Cleveland and Cincinnati to investigate how similar legislation was working in Ohio.<sup>33</sup> An earlier annual report in 1908 placed the work on behalf of passage of this legislation into a national context for reform by referring not only to work being done in Illinois, but similar legislation either passed or being considered in other areas of the country.<sup>34</sup>

In the annual bulletin issued in 1911-12, after this five-year review, President Matz again discusses the Society’s legislative efforts. He describes four bills that the Legal Aid Society was actively interested in presenting and states that all four of these were for the good of the community. Part of the goal of introducing such legislation was education of the public. Matz states that although “like nearly all proposed legislation of this character, they failed of passage, the agitation served to acquaint the public with conditions and it is believed . . . in the next legislature these bills will be introduced with better results.”<sup>35</sup> Similar

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<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.*

<sup>34</sup> Third Annual Report, Legal Aid Society of Chicago 8 (1908).

<sup>35</sup> Bulletin of the Legal Aid Society of Chicago Number 1, i, reprinted in 6 ILLINOIS LAW REVIEW (1911-1912). The four bills were a wife abandonment bill which provided that when a man was committed for desertion of wife and family he should be put to work and 1.50 per day appropriated by county for wife and family; a personal property brokers bill which provided for borrowing money on household goods, clothing or mechanics tools; a wage assignment bill which regulated the method of wage assignments; and a bill known as Farwell bill which provided for an association to lend money to poor persons on security of household goods, clothing and mechanics’ tools. *Id.* at i-ii. A similar reference to legislative work that failed being educational is found in the seventh annual report. SEVENTH ANNUAL REPORT, LEGAL AID SOCIETY OF CHICAGO 9 (1912).

references can be found in other annual reports and bulletins in the period 1900-1920.<sup>36</sup> Matz, in a speech given to the Second Conference of Legal Aid Societies in 1912, describes how the Legal Aid Society of Chicago “in the twenty-five years of its existence ha[d] been before the legislature many times [and how] it ha[d] been instrumental in introducing and helping to secure the passage of a number of acts now included in the Statutes of Illinois.”<sup>37</sup> Indeed, writing in 1926, Marguerite Gariepy, the Senior Attorney for the Legal Aid Bureau of Chicago, the successor organization to the Legal Aid Society, discusses the remedial work performed by the Society. She states there was constant effort toward improving the administration of existing laws and the passage of remedial legislation.<sup>38</sup> She cites legislation to deal with wage assignments and laws regulating small loans and efforts to reform the justice of the peace system as examples. Although she does not always give specific dates for

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<sup>36</sup> References to legislative work are found in almost every annual report from 1906 through 1919 (the date of the merger with United Charities). See e.g. SECOND ANNUAL REPORT 18, *supra* note 29 (work on Crime Against Children Act recently declared unconstitutional, needs small change in wording which Society will work on); THIRD ANNUAL REPORT, LEGAL AID SOCIETY OF CHICAGO 16-17 (1908) (discussing legislation defining and punishing crimes against children and the drafting of a law to create a class of brokers to be known as “personal Property Brokers” and place limitations upon interest charged on loans given by this class of brokers); EIGHTH ANNUAL REPORT, LEGAL AID SOCIETY OF CHICAGO 13 (1913); (referring to legislative work on loan shark matters); THIRTY-FIRST ANNUAL REPORT, LEGAL AID SOCIETY OF CHICAGO 13 (1916) (President’s report discusses preventive law work and that from the beginning the Legal aid Society of Chicago has been “a consistent believer in that kind of work.” The report goes on to discuss various legislative efforts by the Society).

<sup>37</sup> Rudolph Matz, Legal Aid Societies as a Clearing House For Other Organizations and as a Factor in Securing Social legislation, SECOND CONFERENCE OF LEGAL AID SOCIETIES OF THE UNITED STATES 27 (1912).

<sup>38</sup> Marguerite Raeder Gariepy, *The Legal Aid Bureau of United Charities of Chicago*, 124 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 33, 34-35 (1926).



these activities, it is clear that she is referring to the period 1900 to 1920.<sup>39</sup>

Therefore, it is fair to conclude that law reform work, although focused almost exclusively on legislative work, was part of the Legal Aid Society of Chicago's central mission. The casework described in the annual reports is one-to-one case work and would fit the stereotypical descriptions of legal aid mentioned earlier, but the legislative reform efforts would not. It is not entirely clear why the Legal Aid Society focused solely on reform through legislation, rather than a mixed agenda of legislation and appellate or "test cases." One possible explanation is that most Progressive era reform efforts were mainly concerned with legislative reform and Chicago followed this model. Another is that the Courts were not seen as places to achieve social change.<sup>40</sup>

As the 1920s approached, trends developed that perhaps led to the abandonment of law reform efforts. Later, annual reports during this period emphasized caseload pressures and lack of funding.<sup>41</sup> Both of these developments would make pursuing a mixed agenda of law reform and individual casework more difficult. Moreover, Rudolph Matz, the President of the Legal Aid Society and who had been a longtime supporter of law reform efforts, appeared to become more ambivalent about law reform's place in legal aid. In the 1916 Annual Report he celebrated the Legal Aid Society's long time commitment to such

<sup>39</sup> *Id.* All of her references to law reform are to the period pre-1919.

<sup>40</sup> See Stephen C. Yeazell, Brown, *The Civil Rights Movement and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1977-1978. (2004) (referring to the period post-civil War through the 1950s as not hospitable to attempts at social change, Yeazell states: "One cannot blame those who sought what they would describe as "progressive" social change for not thinking first of litigation as the instrument of that change.").

<sup>41</sup> See THIRTY-THIRD ANNUAL REPORT, LEGAL AID SOCIETY OF CHICAGO 13 (1918) at 13. The President of the Society states: "The last year has been one of peculiar anxiety for all those interested in the welfare of the Legal Aid Society, owing to the increased difficulty in financing the work, the demand which seems without limit . . ."

efforts,<sup>42</sup> but in the same annual report he also questioned law reform's central role in legal aid's agenda. Commenting on a speech by Reginald Heber Smith at the National Legal Aid Convention in 1916, Matz states:

In my mind it is a mistake to attempt preventive legislation except in an incidental way. The primary object of the Society is not to bring about reform of certain laws. The minute we begin to do that, . . . we are going to be known as reformers who "have a mission," or we are going to be considered "visionary."<sup>43</sup>

He then goes on to say, "when we see a great evil [in concrete cases], we can make a suggestion as to reforming that particular abuse."<sup>44</sup> This last statement can be read as echoing his earlier statement that law reform should be incidental to the central mission or a more nuanced position that law reform efforts should arise from the problems clients bring to legal aid. This interpretation is similar to the ideas about how to approach reform efforts developed by Gary Bellow, one of the leaders of the modern legal aid movement.<sup>45</sup> Another way to read Matz's remarks was that he was worried about losing the support of the public if legal aid were perceived as crusaders. He states that having law reform efforts arise from concrete cases leads to the society being on "solid ground" when it goes to the legislature and allows it to "accomplish things which we could not accomplish in any other way."<sup>46</sup> Combined with the caseload and fund-

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<sup>42</sup> THIRTY-FIRST ANNUAL REPORT, *supra* note 36.

<sup>43</sup> *Id.* at 16.

<sup>44</sup> *Id.*

<sup>45</sup> Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 121 (1977). See also Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L. J. 1529, 1538 (1995) (criticizing distinction between "service" and "impact" cases and arguing every case should "contribute to an attack on situations or practices that disadvantage a larger number of poor persons.").

<sup>46</sup> See *supra* note 43.

ing worries mentioned above,<sup>47</sup> this may have become a time where Matz felt a need to deemphasize the Legal Aid Society's law reform pedigree. However one interprets Matz's remarks, it still remains that throughout most of this period, the Legal Aid Society of Chicago presented a model that was different from the stereotypical image of legal aid that becomes dominant later.

### **B. Boston**

Boston presented a somewhat different model and development.<sup>48</sup> It is here that the ideas of law reform or "preventive law" were more fully developed. The Boston Legal Aid Society, which was founded in 1900, initially contracted with private lawyers to do the work of the Society.<sup>49</sup> In July 1910, ten years after its founding, the Boston Legal Aid Society opened its own office and employed its first full time lawyer.<sup>50</sup> Although this step was significant, until Reginald Heber Smith became General Counsel in 1914, there was little impact upon the work of the Legal Aid Society either in number of cases or types of cases. During this period 1900 to 1914, its espoused goals and work were consistent with the image of a traditional legal aid society handling cases one by one and judging clients by their worthiness.<sup>51</sup>

<sup>47</sup> See *supra* note 41.

<sup>48</sup> Many of the ideas in this section and the next section on the Boston Legal Aid Society, see *infra*, were first developed in Spiegel, *supra* note 11.

<sup>49</sup> The Society employed the firm of Hill & Homans, as its general counsel. The firm remained counsel until 1907. Between 1907 and 1910, two other firms were counsel on basically same arrangement. Spiegel, *supra* note 11, at 26.

<sup>50</sup> Tenth Annual Report of the Boston Legal Aid Society 5 (1910).

<sup>51</sup> See, Directors' Report, TWELFTH ANNUAL REPORT OF THE BOSTON LEGAL AID SOCIETY 5 (1912). For example, its Annual Report for 1912 states:

While [the Society] is prepared to devote time energy and money in rendering legal aid to poor, yet it must first appear that our client has an honest and worthy cause. [W]e have for the past year and a half employed the services of an experienced and skilled social worker to investigate the honesty and

When Smith became General Counsel of the Boston Legal Aid Society in 1914, his first undertaking was writing an office manual that included instructions and memoranda to the attorney staff and descriptions of the law on common classes of cases.<sup>52</sup> This attempt to impose systemization and order on the work was consistent with Smith's efforts elsewhere. At Hale and Dorr, where Smith worked for almost fifty years, he perfected the time sheet. He also wrote several articles and a monograph on law office management.<sup>53</sup> These efforts are consistent with the scientific part of the progressive movement that believed that reform could be accomplished through application of scientific managerial methods.<sup>54</sup>

Smith's ideas of organization and scientific rationalization appeared to lead to increased caseload and a decrease in cost per

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worthiness of all cases not already investigated by some responsible person.

*Directors' Report*, Twelfth Annual Report of the Boston Legal Aid Society 5 (1912).

<sup>52</sup> As Smith described it:

[The] purpose of this edition is to set out instructions for each department but the five papers taken together set out the system of organization of the entire work. Thus the entire system is reduced to a detailed statement in tangible form. In this way permanence of system secured—newcomers do not have to devise their own system and work can be handed from one person to another so a second purpose of these papers is to secure the permanency of the system which they describe.

Boston Legal Aid Society, *Instructions, Suggestions and Memoranda for New Counsel* 5 (1914) (on file with Social Law Library, Boston, Massachusetts). See also Counsels Report, *FOURTEENTH ANNUAL REPORT OF THE BOSTON LEGAL AID SOCIETY*, 1914 at 11 (describing this new system).

<sup>53</sup> See, e.g., Reginald Heber Smith, *Law Office Organization, Parts I-IV*, 26 A.B.A. J. 393-96, 494-96, 500-02, 610-612, 648-651 (May, June, July, Aug., 1940). Smith's work on behalf of Hale and Dorr is described in JOHN A. DOLAN, *HALE AND DORR BACKGROUNDS AND STYLES* (1993) at 231-38.

<sup>54</sup> See e.g. Samuel Haber, *Efficiency and Uplift: Scientific Management in the Progressive Era* (1964).

case.<sup>55</sup> These achievements were part of his goals, but Smith was not all about numbers.<sup>56</sup> He wrote:

It may be because of my personal temperament or because of fundamental instincts inherited from my mother, or because of my high ideals of professional duty inculcated by Dean Thayer that I was never able in my legal aid work to view the troubles of my clients as “cases.” I never was successful in disassociating the problem from the human being who presented it and was involved in it. The inevitable result was that in a vicarious but nevertheless real way I live my clients lives, suffered with them, and when the administration of justice failed in its high purpose I experienced the same moments of shock and despair as they did.<sup>57</sup>

This shock and despair at the failures of the legal system led him to see the need for using law for social change. Smith called these efforts preventive law. As stated above, these social change goals were consistent with some of the ideas of the progressive movement that scientific expertise could lead to reform.

Smith discussed his ideas about preventive law in a number of places, including the Boston Legal Aid Society annual reports, *Justice and the Poor*, and various speeches and articles.<sup>58</sup> A

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<sup>55</sup> Caseload increased during the 1914-1915 year by 65%, to 2229 new cases and the average net cost per case decreased from \$3.63 per case to \$1.63. *Counsel's Report*, FIFTEENTH ANNUAL REPORT OF THE BOSTON LEGAL AID SOCIETY 30 (1916).

<sup>56</sup> See the recollections of Herbert Erhmann who worked with Smith from 1914 to 1916. Erhmann recounts how “[u]nder Smith . . . the data were made to assume a general significance. This began the use of legal aid experience as a gauge of weak spots in our social order.” Herbert B. Erhmann, *Annals of a Legal Aidist*, 52 American Bar Association Journal 846, 847 (1966).

<sup>57</sup> Letter from Reginald Heber Smith to Alfred Reed dated December 31, 1919 in *Justice and the Poor Correspondence 1913-1921*, (Harvard Law School Archival collection).

<sup>58</sup> See, e.g., SMITH, *JUSTICE AND THE POOR*, *supra* note 13; Reginald Heber Smith, *Preventive Law: The Great Opportunity of the Legal Aid Society*, PRO-

speech he gave to the National Convention of Legal Aid Societies is representative. In this speech, Smith compared preventive law to preventive medicine.<sup>59</sup> He stated that the average private attorney does not have the material or data to engage in such preventive efforts, but the legal aid society with its thousands of cases has a wealth of available material to analyze where there are trouble spots in the law. A legal aid society's charge, therefore, should be to study its cases, seek causes for problems, ascertain how far these causes are preventable by law, and then work to secure that prevention.<sup>60</sup>

This preventive or law reform work could include obtaining decisions from courts of last resort, remedial legislation, and change "through propaganda and the education of the public's point of view on certain legal problems."<sup>61</sup> Every legal aid society should have a "fight fund" to carry proper cases up to final adjudication by courts of last resort.<sup>62</sup> In a statement that foreshadows an article by Marc Galanter written almost sixty years later on why repeat players have advantages within the legal system,<sup>63</sup> Smith writes, "[t]he railroads, the insurance companies and others are steadily appealing cases to refine, limit and restrict legal doctrines, and this war of attrition produces results."<sup>64</sup> According to Smith, legal aid "is the obvious agency to

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CEEDINGS OF THE NATIONAL ALLIANCE OF LEGAL AID SOCIETIES, THIRD BIENNIAL CONVENTION (Fourth conference) 63 (1916) reprinted in 15 LEGAL AID REV. NO. 2, Apr. 1917, at 1-6 [hereinafter Smith, *Preventive Law*]; *Counsel's Report*, in FOURTEENTH ANNUAL REPORT OF THE BOSTON LEGAL AID SOCIETY 8-27 (1914).

<sup>59</sup> Smith, *Preventive Law*, *supra* note 58, at 1. This idea of looking to the individual cases that come to you to ascertain the need for reform is similar to the ideas express by Rudolph Matz, President of the Legal Aid Society of Chicago. They are also similar to the ideas expressed by Gary Bellow some sixty years later. See *supra* note 45.

<sup>60</sup> Smith, *Preventive Law*, *supra* note 58, at 2-3.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.*

<sup>63</sup> Marc Galanter, Why the "Haves" Come Out Ahead: Speculations On the Limits of Legal Change, 9 LAW & SOC. L. REV. 95 (1974).

<sup>64</sup> Smith *Preventive Law*, *supra* note 58, at 3.

resist such attacks [of businesses].”<sup>65</sup> If corporations are repeat players looking for good cases to appeal, legal aid societies should do the same. They should also take advantage of their repeat player status.

Smith’s ideas had considerable influence over the work of the Boston Legal Aid Society. The Legal Aid Society still focused on individual cases, but during the Smith years, it developed a substantive law reform or, to use Smith’s phrase, a preventive law focus. The Society began doing more focused appellate work. For instance, an appeal was brought in a workers compensation case. The issue was whether a worker was entitled to a determination by the Industrial Accident Board of disputed doctors’ fees. This appeal was brought not only because this issue was important in Massachusetts, but also because a score of other states had similar provisions.<sup>66</sup> In worker’s compensation cases, the Society brought appeals, “where the question is one of general legal importance or societal significance.”<sup>67</sup>

The Boston Legal Aid Society also began doing legislative and educational work. In 1916, it joined with other groups in Massachusetts in pressing for passage of legislation regulating small loans and limiting wage assignments. It also submitted an analysis of complaints against attorneys to the Boston Bar Association to bring public pressure to reform the regulation of attorneys.<sup>68</sup> During World War I, the Boston Legal Aid Society embarked on a major educational effort. A pamphlet, *Legal Suggestions for Soldiers and Sailors*, was published that described the legal rights of those serving in the military. This pamphlet was remarkably successful. It began with an edition of 2500 copies, but eventually was distributed throughout the coun-

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 3-4.

<sup>68</sup> SIXTEENTH ANNUAL REPORT OF THE BOSTON LEGAL AID SOCIETY 3 (1916). Smith also describes working with other organization on the problem relating to illegitimate children with the Society focusing on the legal aspects. Smith, *Preventive Law*, *supra* note 58, at 4.

try. There were twelve or thirteen printings and over 150,000 copies distributed.<sup>69</sup>

Therefore, as with Chicago, it seems fair to say that prior to 1920, law reform work was part of the organization's central mission and not simply a by-product of its casework. This law reform emphasis came later to Boston, but as the Sixteenth Annual Report for the Boston Legal Aid Society states, in reviewing the work of the society during the period 1914-1919, a "new conception of its work has come to the Society."<sup>70</sup> That new conception was law reform or preventive law. However, as contrasted with Chicago, Boston's conception of law reform included both legislative work and test cases.

### C. *New York*

The original purpose or objective of the New York Legal Aid Society was to aid German immigrants, but it evolved in the 1890s to become a general legal aid organization providing services to all groups.<sup>71</sup> Its goal became "to assist the poor and helpless whenever they appear to have been wronged."<sup>72</sup> In 1903, it expanded its scope by adding a clause to its Charter to state that the purpose of the Society was not only to render legal aid gratuitously, albeit to only worthy applicants, but also to promote measures for their protection.<sup>73</sup> This phrase "to promote measures for their protection" can be read to encourage law reform either through litigation or legislation. The issue,

<sup>69</sup> Eighteenth Annual Report of the Boston legal aid Society 27-33 (1918).

<sup>70</sup> SIXTEENTH ANNUAL REPORT, *supra* note 68, at 8.

<sup>71</sup> See MAGUIRE, *supra* note 18, at 58 (describing change in purpose clause in 1890 from rendering legal aid to German immigrants to rendering legal assistance to *all*). See also SMITH, JUSTICE AND THE POOR, *supra* note 13, at 134-138.

<sup>72</sup> Twenty-Sixth Annual Report of The President, Treasurer and Attorneys of the Legal Aid Society for the Year 1901, 55 (1902).

<sup>73</sup> See MAGUIRE, *supra* note 18, at 112.



however, as with Chicago, is to what extent given this goal the Legal Aid Society actually engaged in law reform efforts.

In his history of the Legal Aid Society of New York, John Maguire devotes a chapter to discussing such efforts, starting with a campaign in 1894 against stock market frauds.<sup>74</sup> There was also a Law Committee whose mandate was to consider legislative reform efforts.<sup>75</sup> Moreover, several of the annual reports refer to law reform efforts. For example, the Annual Report for the year 1902 discusses a campaign against abusive installment sales practices resulting in legislation and several indictments.<sup>76</sup> The 1912 Annual Report discusses activities in “larger fields” referring to the fact that “the directors, officers and attorneys of this society are not satisfied with merely aiding in individual cases, large though be their number” but also want to accomplish reform efforts.<sup>77</sup> The reform efforts discussed are persuading Congress to pass laws for the “betterment of the sailor, and for the betterment of the immigrant on our shores” and attacking the unlawful practices of “so called loan sharks” including taking a test case involving a small amount of money all the way up to the Court of Appeals. Maguire also discusses reform efforts at the Seamen’s Branch of the Legal Society, a special office devoted to the problems of sailors.<sup>78</sup> The Seamen’s Branch both proposed legislation and enforced it to protect sailors from

<sup>74</sup> *Id.* at 105-129.

<sup>75</sup> See THIRTY-FOURTH ANNUAL REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY FOR THE YEAR 1909, 12 (1910) (“The Law Committee . . . had many important subjects under consideration — measures for defeating the wicked activities of loan sharks, measures for laying a correct foundation for the Criminal Branch . . . ; investigation of the advisability, desired and similar important matters came under its jurisdiction.”). The same report then goes on to say that the abolition of body execution should not be recommended. *Id.*

<sup>76</sup> Twenty-Seventh Annual Report of the President, Treasurer and Attorneys of the Legal Aid Society for the Year 1902, 25 (1903).

<sup>77</sup> Thirty-Seventh Annual Report of the President, Treasurer and Attorneys of the Legal Aid Society for the Year 1912 (1913).

<sup>78</sup> MAGUIRE, *supra* note 18, at 130-59.

exploitation.<sup>79</sup> It also brought test cases<sup>80</sup> and published a Sailor's Log to advise seamen about their rights.<sup>81</sup> Therefore, although the evidence may not be as strong as with Chicago and Boston, the New York Legal Aid Society did engage in law reform during this period.

New York differs from Chicago and Boston in that, in contrast to the annual reports of the Legal Aid Society of Chicago, which almost always included a section on legislative work, or the annual reports of the Boston Legal Aid Society, which celebrated preventive law, in most of New York's reports we find the absence of celebration or even discussion of law reform efforts. Moreover, in the 1926 *Annals of the Academy of Political and Social Science* there is a history of the Legal Aid Society of Chicago, which celebrated Chicago's law reform past.<sup>82</sup> In that same volume there is an article by Leonard McGee, Chief Attorney of the Legal Aid Society of New York, which celebrates the Society's role in settling cases.<sup>83</sup> It is always possible that these sources understate the importance of law reform to the Legal Aid Society, but absent evidence to the contrary, the annual reports and McGee's article paint a picture where law reform was not as central as it was in Chicago and Boston.

Nevertheless, even if New York presents a less clear picture than Chicago and Boston, it still illustrates that law reform was on the agenda of legal aid organizations pre-1920. New York

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<sup>79</sup> *Id.* at 149-51.

<sup>80</sup> *Id.* at 152.

<sup>81</sup> *Id.* at 151.

<sup>82</sup> See *supra* note 38.

<sup>83</sup> Leonard McGee, *The New York Legal Aid Society (1876-1925)*, 124 *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 27, 29 (1926) ("Perhaps our best work is accomplished in affecting amicable settlement, thereby discouraging litigation and saving time and money to all parties concerned.") It is possible that McGee is referring to the time at which his article is published – 1926- rather than the period I am discussing in this section – 1900 to 1920. However, nothing in his statement or the rest of the article supports a conclusion he was limiting his praise for settling cases to a specific time period.

also illustrates that local conditions mattered.<sup>84</sup> The 1912 annual report seemed to indicate a shift toward more emphasis upon law reform.<sup>85</sup> This, however, did not happen post 1912, as is it did with Boston during the years 1914-1919. Instead the New York Legal Aid Society was on the defensive during this period. The organization's heritage as a German immigrant organization made it suspect with the advent of WWI.<sup>86</sup> Therefore, what might have been a move toward more emphasis upon law reform was stymied because of the particular situation in New York.

#### ***D. National Alliance of Legal Aid Societies***

In 1911 Mark Acheson, Jr., the President of the Pittsburgh Legal Aid Society invited legal aid societies to Pittsburgh.<sup>87</sup> Representatives from fourteen attended and agreed to form a national organization, which became the National Alliance of

<sup>84</sup> There are a number of possible explanations for the difference between New York, on the one hand, and Chicago and Boston on the other. New York had greater case load pressures which might have made it more difficult to engage in law reform efforts. There appeared to be a stronger alternative structure of law reform in New York. Felice Batlan describes the work of Settlement Houses in New York during this period as a mixture of community education and law reform via legislation. Felice Batlan, *Law and the Fabric of the Everyday: The Settlement Houses, Sociological Jurisprudence, and the Gendering of Urban Legal Culture*, 15 SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL 235, 243-47; 266-272 (2006). See also DAVIS, *supra* note 9, at 13-14 discussing the law reform efforts of the settlement houses in New York City and stating that unlike legal aid societies, settlement houses focused on structural change and relied on political and social organizing. Although this could have represented a model for the New York Legal Aid Society to follow, it also could have represented a division of labor.

<sup>85</sup> See *supra* note 77.

<sup>86</sup> MAGUIRE, *supra* note 18, at 219-222. The Society's long time President, Arthur Von Briesen, had to resign. *Id.* at 221.

<sup>87</sup> See THIRD CONFERENCE OF LEGAL AID SOCIETIES OF THE UNITED STATES 7 (1914) See also Leonard McGee, *The National Development of Legal Aid Work*, 20 LEGAL AID REVIEW No. 2 (April, 1922) at 1, 2.

Legal Aid Societies.<sup>88</sup> At the Second National Conference, in 1912, a Constitution was adopted which stated that the purposes of the National Alliance should be:

to give publicity to the work of legal aid societies of the United States, to bring about cooperation and increase efficiency in their work, and encourage formation of new societies.<sup>89</sup>

Hence, if we rely upon this purpose clause alone, the conclusion would seem to be that the goals of the Alliance were that of a trade organization promoting the interests of its members and at best concerned with increasing one to one representation of clients, but agnostic on whether legal aid societies should use the law for social reform.

However, the rhetoric at the meetings promised more. At the first conference in Pittsburgh, George Van Schaick Jr., gave a speech on legal aid societies and legislation. He declared that “[e]fforts in the direction of remedial legislation are in the nature of prevention of conditions against which the legal aid societies are formed to relieve. . . . [Moreover] legal aid societies . . . must not only co-operate as in a national association, but they must sharpen and improve their tools and weapons.”<sup>90</sup> The second conference featured the speech by Matz referred to earlier, in which he exalted the legislative efforts of the Legal Aid Society of Chicago.<sup>91</sup> The fourth conference featured Smith. At this

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<sup>88</sup> SMITH, JUSTICE AND THE POOR *supra* note 13, at 147. For some reason Smith states that delegates from thirteen societies attended rather than fourteen.

<sup>89</sup> SECOND CONFERENCE OF LEGAL AID SOCIETIES OF THE UNITED STATES 18 (1912). Technically this was the first annual meeting of the National Alliance which was formed at this meeting.

<sup>90</sup> George Van Schaick, Jr., *Legal Aid Societies and Legislation*, FIRST ANNUAL CONFERENCE OF LEGAL AID SOCIETIES OF THE UNITED STATES 21, 22-23 (1911).

<sup>91</sup> *Supra Compare*, *supra* note 37; Compare the speech at the same conference by Samuel Scoville, Jr. of the Philadelphia Legal Aid Society where Scoville describes the movement for a Municipal Court in Philadelphia as the most important by-product of the Society’s work. Samuel Scoville, Jr., *By-*

meeting he gave the speech where he discussed his ideas about preventive law.<sup>92</sup> As noted above, Smith compared the opportunities in preventive law to that of preventive medicine. A legal aid society's charge should be to study its cases, seek causes for problems, ascertain how far these causes are preventable by law, and then work to secure that prevention using the tools of law reform such as appellate case work and test case litigation.<sup>93</sup> Moreover, in answering a question from the audience, Smith stated if forced to choose between doing preventive work and leaving some other work undone (presumably individual casework) he would say yes to leaving the other work undone. He does qualify this remark by stating, "you cannot [sic] do preventive work until you have done a certain amount of the other work in order to have the material to go on."<sup>94</sup> But this qualification is similar to the ideas of today that law reform should not be divorced from individual work, but should arise out of it.<sup>95</sup>

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*Products of the Work of Legal Aid Societies*, SECOND CONFERENCE OF LEGAL AID SOCIETIES OF THE UNITED STATES 20, 24 (1912). His use of the phrase by-product could connote that law reform efforts such as the creation of the Municipal are peripheral to the work of a legal aid society, but he appears to have used the phrase in a more ambiguous sense. He states: "In every plant the output or main product is, of course, of commercial importance. It has become, however, a recognized axiom of commercial economics that by-products are of almost equal importance." *Id.* at 22.

<sup>92</sup> Smith, *Preventive Law*, *supra* note 58.

<sup>93</sup> *Id.* at 2-3.

<sup>94</sup> Proceedings of the National Alliance of Legal Aid Societies, Third Biennial Convention (Fourth Conference) 70 (1916). The exact exchange was:

Mr. Robey: I would like to ask Mr. Smith whether he thinks this preventive work that he has spoken of is of sufficient importance to allow some of the other work to go undone?

Mr. Smith: That is a hard choice you have put to me. If I am confined to the question, I should say yes, but you can not do preventive work until you have done a certain amount of the other work in order to have the material to go on; it really comes to, and when it comes, I think your experience will be like ours; as soon you get into it you will find a lot of people who are interested in helping you do it.

<sup>95</sup> See *supra* note 45.

Smith was not the only speaker at the Fourth Annual Meeting in 1914 to discuss preventive law or law reform. At the annual banquet, Professor Graham Taylor gave a speech titled *Legal Aid: A Link Between Social Justice and the Law*.<sup>96</sup> In this speech, Taylor argued that legal aid societies should be more than a dispensary of advice. They should educate people about the law and even go further to aspire to “a wider work of interpretation” and engage in the “fundamental work of promoting better legislation.”<sup>97</sup> None of this is to claim that law reform was all that was discussed at these meetings. For example, at the Second Annual conference, the same one where Matz gave his speech about legislation and law reform, John V. Laddey of the New Jersey Legal Aid Society described his conception of a legal aid society as existing not only to protect the individual who contacts the Society, but also to protect society against that individual taking advantage. He then divides legal aid claimants into the unquestionably worthy, the questionably worthy and the unquestionably unworthy. According to Laddey, it is the job of the legal aid lawyer to sort clients out into these groups and only give assistance to those deemed worthy.<sup>98</sup> There were, however, enough celebrations of law reform at the annual meetings to make law reform more than a sideshow, but rather part of the mainstream agenda of the National Alliance.

The 1914 meeting was the last before World War I intervened. The organization suspended its meetings until 1922, when it held its last meeting.<sup>99</sup> Therefore, it is impossible to say what direc-

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<sup>96</sup> THIRD BIENNIAL CONVENTION *supra* note 94, at 123.

<sup>97</sup> *Id.* at 128. Jack Katz argues that Taylor was the real reformer and that Smith's speech at the convention was more conservative. See KATZ *supra* note 11, at 37. My reading differs from his. I think Smith's emphasis on preventive law and his willingness to state it should displace everyday work, if necessary, is every bit as progressive as Taylor's.

<sup>98</sup> John V. Laddey, *Opportunities for Social Service in Legal Aid Work*, SECOND CONFERENCE *supra* note 89, at 60-61 (1912).

<sup>99</sup> Address by Leonard McGee, *Duties and Work of A National Legal Aid Organization*, 99, 100 PROCEEDINGS OF THE FIFTH NATIONAL CONFERENCE OF LEGAL AID BUREAUS AND SOCIETIES (1922).

tion subsequent meetings during the period pre-1920 would take the National Alliance. Moreover, as Smith points out in *Justice and the Poor*, the national organization was not influential. It had a weak central body, no independent funding, and local organizations did not want to surrender authority to a national body.<sup>100</sup> Nevertheless, the rhetoric was not insignificant. It paralleled the efforts discussed earlier in Chicago, Boston, and, to a lesser extent, New York. As Smith stated in 1919 in his final report to the Boston Legal Aid Society:

The [Legal Aid] Society has passed out of the experimental stage and is now an established and respected institution. . . . I cannot believe that this democratic nation will much longer tolerate the glaring inequalities which result from our present judicial administration. Either legal aid societies will provide the solution or they will fail to measure up to their opportunity and be thrown to one side. If events continue to move with their present rapidity, the next decade will provide the answer.<sup>101</sup>

Therefore, the question of what direction legal aid would take would be decided in the 1920s. It could follow the lead of the rhetoric presented to the National Alliance and solidify the ideas of preventive law or it could retreat and focus almost exclusively on one to one representation.

## II. LEGAL AID: 1920s

What did happen post 1920? To some extent what happened was significantly affected by local events. We see that most clearly with Chicago and Boston. However, there was a national trend or retreat away from the ideas of preventive law and to-

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<sup>100</sup> SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at 147.

<sup>101</sup> Eighteenth Annual Report of the Boston Legal Aid Society 45, 47 (1919).

ward limiting legal aid to one-to-one representation. To explore this trend, I again look at the legal aid societies in Chicago, Boston, and New York. I also look at the National Association of Legal Aid Organizations, the successor organization to the National Alliance of Legal Aid Societies.

### A. *Chicago*

The most significant event during this period for the Legal Aid Society of Chicago was its consolidation with United Charities.<sup>102</sup> United Charities was founded in 1857 and was originally called the Chicago Relief and Aid Society.<sup>103</sup> It assumed the name of United Charities in 1909 when it merged with the Chicago Bureau of Charities, a group doing similar work. The primary reason legal aid joined this family assistance agency was financial.<sup>104</sup> In its 1918 annual report, the Legal Aid Society noted, “the last year has been one of peculiar anxiety . . . owing to the increasing difficulty in financing the work, the demand for which seems to be without limit . . .”<sup>105</sup> Savings would occur from the merger with United Charities by eliminating duplication of efforts. United Charities was providing some legal ser-

<sup>102</sup> See Garipey, *supra* note 38, at 35. Although the actual consolidation occurred in 1919, its effects were during the period under consideration the 1920s.

<sup>103</sup> United Charities of Chicago, *Sixty-Six Years of Service, An Account of the Activities of United Charities of Chicago including Reports of Social Work Done and Financial Statement for the period October 1, 1919 to October 1, 1922* at 7. (1923). The Relief Society’s Charter stated that its purposes were: “To provide a permanent efficient and practical mode of administering and distributing the private charities of the City of Chicago; to examine and establish the necessary means for obtaining full and reliable information of the condition and the wants of the poor of said city, and putting into practical and efficient operation the best system of relieving and preventing want and pauperism therein.”

<sup>104</sup> Marguerite Raeder Garipey, *Legal Aid as Part of A Community Program*, 205 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 72, 72 (1939).

<sup>105</sup> Thirty-Third Annual Report of Legal Aid Society of Chicago for the Year 1918, 13 (1919).



vices through its ten district offices and, in theory, the legal aid society could achieve savings by merging with these neighborhood offices. However, in reality, the Legal Aid Society had no choice. It was not cost savings that propelled the affiliation with United Charities, but the need for new financing. But survival had its price.

Although the Legal Aid Society presented its affiliation with United Charities as an amalgamation or merger, in actuality, it was a takeover. The Legal Aid Society became a division of United Charities and under the control of the United Charities.<sup>106</sup> It adopted the United Charities' charitable and social work philosophy. According to United Charities, legal aid cases, which were settled and constituted 96.3% of the cases, "are not more complicated nor involved than some of the social and health problems presented to the family case worker."<sup>107</sup> Therefore social workers could work independently on these less complicated legal cases "provided the attorneys were in easy reach for consultation."<sup>108</sup> Other changes were in the handling of domestic cases, such as divorce, non-support, custody of children, and annulment of marriages. These cases were now "considered first as social rather than legal problems."<sup>109</sup> They were counted in case statistics as family case work problems and not as legal

<sup>106</sup> SIXTY-SIX YEARS OF SERVICE, *supra* note 103, at 49 -50 (Policies of Legal Aid Bureau determined by directors of United Charities sitting in joint session with the Legal Aid Committee of the Chicago Bar Association). Also see *id.* at 7 ('the work of the Legal Aid Society . . . was also taken over by United Charities and the service heretofore rendered by this general legal charity was made a component part of the United Charities work.") Compare the remarks of Marguerite Raeder Garipey. Marguerite Raeder, *Relations of Legal Aid Organization to Social Service Agencies*, FIFTH NATIONAL CONFERENCE 25, 26, *supra* note 99( (1922) ('legal aid is but a phase of social work using that expression in its broadest sense").

<sup>107</sup> Joel D. Hunter, *Report of General Superintendent*, 15 YEARBOOK OF THE UNITED CHARITIES OF CHICAGO 1918-1919 15.

<sup>108</sup> *Id.*

<sup>109</sup> SIXTY-SIX YEARS OF SERVICE, *supra* note 103, at 47. Another policy change was that "Jewish cases" were referred out to the Associated Jewish Charities. Previously the Legal Aid Society kept the "Jewish cases." *Id.* at 46.

cases.<sup>110</sup> If a woman came to the legal aid office looking for a divorce she would, with few exceptions, be sent to the district office of the United Charities where her case would be looked into as a social problem and then, if legal action was found necessary, the case would be returned to the attorney.<sup>111</sup>

Perhaps the best indication of a change in philosophy and in the work is the annual reports for this period. The Legal Aid Society no longer produced its own annual reports, but the reports of its activities were now part of the annual reports for United Charities. As such, they were mainly limited to a recitation of numbers of cases. No longer do we find a record of legislative accomplishments, nor do we find the rhetoric that part of the function of legal aid was to engage in legislative law reform.<sup>112</sup> Instead we find a section on the "Advantage of Social Work and Legal Aid Co-Operation."<sup>113</sup> The Report for 1922, which was part of the Sixty-Six Years of Service Report put out by United Charities, does state that an important function of legal aid has been to make a "record of difficulties in the administration of improvement of justice and therefore to assist in bringing about its improvement."<sup>114</sup> Rather than discussing ways the Legal Aid Bureau can directly engage in such law reform efforts, the only proposal for implementation was to send the

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> The one exception is in a report in 1927 where it discusses a case against a loan shark. The report states "[t]he importance of this case was the precedent it set" and then goes on to declare that "the Legal Aid Bureau not only defends isolated individuals, but is in a position to learn of the accumulation of wrongs . . . [and] if need be, formulate legislation to supplement existing laws." This certainly reflects a law reform perspective. LEGAL AID BUREAU OF UNITED CHARITIES, THE LEGAL AID BUREAU'S SERVICE: THE POOR MAN'S LAW OFFICE 13 (1927). However, the report does not detail any efforts to follow through on the precedent set in the loan shark case or in any other area. Instead we have the suggestion in the 1922 Report that the next step is to simply inform the Bar association of problem areas. See *infra* note 115 *infra*.

<sup>113</sup> SIXTY-SIX YEARS OF SERVICE, *supra* note 103, at 47.

<sup>114</sup> *Id.* at 50.

reports to a “committee of the Chicago Bar Association.”<sup>115</sup> As Jack Katz concluded, “[p]ublic alerts to conditions especially oppressive to the poor and accounts of campaigns for remedial legislation dropped out of Legal Aid’s reports.”<sup>116</sup> The ideals of preventive law, in which each case would be studied by lawyers to find patterns and to see whether more systemic solutions were needed, were abandoned.

### **B. Boston**

At first, post-1920, it appeared the Boston Legal Aid Society continued on the path of more aggressive law reform work. The Twentieth Annual report in 1921 was titled, optimistically, *Justice Within Reach: A Survey of the Work of the Boston Legal Aid Society*. The Society celebrated that it had developed a new conception of its usefulness, post-1915.<sup>117</sup> The new conception paralleled many of the ideas Smith set out in his articles about preventive law. The report repeated Smith’s idea that the Legal Aid Society could be likened to a laboratory and its files could be viewed as the test tubes in which laws were tested. The material in its files could be studied to determine whether there was need for additional legislation.<sup>118</sup> The report credited the Legal Aid Society with helping to pass significant legislation. It was instrumental in bringing about several important amendments to the Workers Compensation Act, for example, and also claimed a large part of the credit for enactment of a Small Claims Act.<sup>119</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> KATZ, *supra* note 11, at 38.

<sup>117</sup> *Report of the General Counsel, in Twentieth Annual Report of the Boston Legal Aid Society* 13 (1921) [hereinafter *Twentieth Annual Report*].

<sup>118</sup> *Id.* at 14.

<sup>119</sup> *Id.* at 14-15. The need for small claims legislation was demonstrated by analyzing records of the Boston Legal Aid Society and other legal aid societies. Several counsel of the Boston Legal Aid Society actively urged passage.

Moreover, after World War I, the Legal Aid Society was also involved in appellate work. The 1922 annual Report noted that the Society had three appellate cases under the Workers Compensation Act.<sup>120</sup> Yet there were signs of difficulty in the 1920 annual report. Turnover of staff had become a significant problem. Only one attorney remained from the 1918-1919 period.<sup>121</sup> After Smith resigned as General Counsel at the end of 1918, there was rapid turnover in that position until 1923, when Raynor Gardiner became general counsel.<sup>122</sup> In addition to the problem of turnover, there were constant concerns about financial issues. For example, the 1920 report made a plea for establishing an endowment fund.<sup>123</sup> The minutes of a 1925 Board of Directors Meeting reported that the financial situation of the Society was serious, and that the Society only had on deposit approximately \$900 to meet a payroll of approximately \$1600.<sup>124</sup>

Moreover, a new purpose other than law reform became significant for the Legal Aid Society: assimilating the foreign born and preventing them from becoming anarchists or Bolsheviks. The Twentieth Annual report noted that for the first time, figures were kept to show “how large a number of those seeking aid were of foreign birth.”<sup>125</sup> This data was important because “when committees on Americanization are being formed in every city and when immigration and melting pot are themes for discussion in every public assembly, the contribution of the Legal Aid Society to the adjustment of the troubles of the foreign-born has great significance because it determines in part the atti-

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<sup>120</sup> *Report of the General Counsel*, Twenty Second Annual Report of the Boston Legal Aid Society 17 (1923).

<sup>121</sup> TWENTIETH ANNUAL REPORT *supra* note 117, at 19.

<sup>122</sup> Gardiner remained in this position until 1965. 7 WHO WAS WHO IN AMERICA 214 (1981); Boston Legal Aid Society Press Release, February 18, 1965 (on file with author).

<sup>123</sup> TWENTIETH ANNUAL REPORT *supra* note 117, at 19-20.

<sup>124</sup> BOSTON LEGAL AID SOCIETY, MINUTES OF BOARD OF DIRECTORS MEETING (Oct. 22, 1925) (On file with the Social Law Library, Boston).

<sup>125</sup> TWENTIETH ANNUAL REPORT *supra* note 117, at 13.

tude of these people [foreigners] toward the government.”<sup>126</sup> Whether the Legal Aid Society’s support of assimilation had merit, such a policy did not seem conducive to challenging established institutions and therefore advancing a law reform agenda.

Raynor Gardiner, who as noted above became General Counsel of the Legal Aid Society in 1923, stated in an interview conducted in 1958 that the Legal Aid Society should not be involved in large-scale litigation, but instead it should stick closely to the purposes of the Society to represent “any person who cannot afford the employ of private counsel.”<sup>127</sup> Gardiner’s position that the Society should avoid large-scale litigation was formed in the 1920s. He was reacting to a class action in equity that the Boston Legal Aid Society undertook in 1922. The case generated significant unfavorable publicity and resulted in criticism of the Legal Aid Society for pursuing litigation involving millions of dollars.<sup>128</sup> During the rest of the decade and thereafter, the Society retreated from the ideals of preventive law that

<sup>126</sup> *Id.* The sidebar to the text is the title “Americanization through the Law.”

<sup>127</sup> Philip Cronin, *Dramatis Personae Raynor M. Gardiner*, 2 BOSTON BAR JOURNAL No. 1 at 1920, (January, 1958).

<sup>128</sup> The Society was approached by a number of people who had been defrauded by a scheme of selling stock. *Report of the General Counsel*, TWENTY FIRST ANNUAL REPORT OF THE BOSTON LEGAL AID SOCIETY 10-11 (1922). The case on their behalf was filed before a single justice of the Massachusetts Supreme Judicial Court asking for fourteen million dollars on behalf of the class. *Spear v. H. V. Greene Co.*, Equity No. 36618 (Sup. Jud. Ct. Suffolk County filed July 12, 1922). It was reported in all of the leading newspapers of the day. See, e.g., *Sue Greene Companies*, BOSTON TRANSCRIPT, July 12, 1922, at 1, 10; *Enjoins Greene Co.’s Operations Pending Suit for \$14,000,000*, BOSTON HERALD, July 13, 1922, at 1, 6 (“Legal Aid Society Gets Writs—Puts Whipple as Joint Conspirator—Merely Trustee, He Says”); *Seek \$14,000,000 in Greene Suit*, BOSTON GLOBE, July 13, 1922, at 1, 9 (“H. V. Greene Companies and Many Prominent Men Named”). According to Gardiner, there was considerable criticism of the Legal Aid Society for pursuing litigation involving millions of dollars and suing prominent people who were on the Board of Directors of the defendant. He also stated that as a result of the controversy morale was very low. See *supra* note 127, at 19.

Smith espoused in the previous decade. In reading annual reports from 1923 on, it is apparent that the preventive law Smith championed was no longer central. The idea that the Legal Aid Society was a laboratory for determining where there are injustices was no longer mentioned. As Gardiner stated in his 1958 interview, the work of the Legal Aid Society had become largely domestic relations conflicts.<sup>129</sup>

Similar to Chicago, the decade of the 1920s resulted in change of emphasis for the Boston Legal Aid Society. Some of the reasons, such as financial, may have been the same, while some of the reasons may have been unique to each city. However, the result was the same – law reform or preventive law was no longer central to the mission or work of the legal aid society.

### C. *New York*

In New York during this period, as with Chicago and Boston, the dominant work of the Legal Aid Society was a focus on individual case representation. In its Fiftieth Annual Report for the year 1925, the Attorney in Chief for the Legal Aid Society of New York reviewed the work of the Society since its inception. He stated, “[w]e do not give charitable support to needy persons, but only justice and enforcement of just and honorable claims.”<sup>130</sup> In discussing the work done in 1925, he stated, “[i]n

<sup>129</sup> See *supra* note 127. In 1973, almost apologetically, the annual report says: The Legal Aid Society functions much like a clinic. It's clients have many emergencies. We do our level best to meet them. It should be obvious and convincingly clear without organized legal aid services, the many thousands of people we are helping would have no voice in the administration of justice.

Seventy-Third Annual Report of the Boston Legal Aid Society (1973).

<sup>130</sup> FIFTIETH REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY FOR THE YEAR 1925, 18 (1926). In discussing its rule about giving legal assistance only to worthy applicants the report states this rule was put in force because of numerous complaints against the Society enforcing wage claims on behalf of servants who left their employer abruptly. *Id.* at 19.

our endeavor to represent worthy applicants, it was found necessary to refuse assistance to 642 persons.”<sup>131</sup> Not only did the Society see itself as restricting its work to the worthy poor, but the Society’s “best work is accomplished in affecting amicable settlement.”<sup>132</sup> His rhetoric found in the 1925 report is typical of the statements found in the annual reports during the 1920s.<sup>133</sup> It is also typical of the stereotypical legal aid organization that existed prior to the advent of OEO Legal Services.

There were from time to time, however, also suggestions of a more reformist agenda. In the same Fiftieth Annual Report, there was mention of the New York Legal Aid Society carrying a case all the way from the Municipal Court to the Court of Appeals. The case may have only involved \$24, but the “final decision affected claims total[ed] over \$100,000.”<sup>134</sup> In the 1921 annual report, there was discussion of how the Legal Aid Society managed to deal with a land swindle by aggregating a number of claims and having a trustee agreement entered into with the goal of achieving “an equitable settlement” for all claimants.<sup>135</sup>

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<sup>131</sup> *Id.* at 25.

<sup>132</sup> *Id.* at 20.

<sup>133</sup> For example in the annual report for 1921 it states: “strictly adhering to our rule to refuse our services to those deemed unworthy necessitated our turning away 1,050 applicants.” FORTY-SIXTH REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY FOR THE YEAR 1921, 17 (1922). See also the annual report for 1927 where there is discussion of how one of the difficulties of being a Poor Man’s Lawyer is to determine whether the client is sufficiently poor. There is also discussion in this same report of how to detect the “professional deadbeat.” FIFTY-SECOND REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY FOR THE YEAR 1927, 18-19 (1928).

<sup>134</sup> FIFTIETH ANNUAL REPORT, *supra* note 130 at 20.

<sup>135</sup> FORTY-SIXTH ANNUAL REPORT, *supra* note 133, at 34. See also the Forty-Ninth Annual Report for 1924 where there is discussion of reform of the Workman’s Compensation act. FORTY-NINTH REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY FOR THE YEAR 1924, 30 (1925).

Nevertheless, I still conclude that the work of the New York Legal Aid Society fits the thesis that during the 1920s, legal aid largely abandoned the ideals of preventive law. I conclude this not only because New York's law reform work was minimal, but also because it was not placed in a larger context or framework of using legal services cases to achieve reform or equality. Caseload was not studied in order to discern patterns that might lead to reform efforts. Instead, settling cases was the work that was celebrated.<sup>136</sup>

#### ***D. National Association of Legal Aid Organizations***

This absence of support for preventive law or law reform efforts is also illustrated by looking at the organization that was created as the successor to the National Alliance of Legal Aid Societies. After the fourth meeting of the National Alliance, further meetings were suspended because of the advent of World War I.<sup>137</sup> In 1922, a final meeting was held where it was decided to form a new national organization because of the perceived weaknesses of the existing organization.<sup>138</sup> This new national organization would have "a representative legislative and executive body, [so that] it [could] provide genuine leadership in extending and improving" the work of legal aid organizations.<sup>139</sup> The legislative body would have real power.<sup>140</sup> In preparation for the new organization the Alliance formed seven committees.

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<sup>136</sup> See *supra* note 83.

<sup>137</sup> See *supra* note 99.

<sup>138</sup> According to its critics, the National Alliance did not have sufficient authority to effectively coordinate the activities of the various local legal aid organizations. The National Alliance was viewed "like a federal government without the power of taxation." Reginald Heber Smith and John S. Bradway, *Growth of Legal aid Work in The United States*, BULLETIN OF US BUREAU OF LABOR STATISTICS 68 (1926). See also McGee, *supra* note 99 at 102 ("National Alliance today is like the Articles of Confederation—an assembly of local sovereignties").

<sup>139</sup> *Growth of Legal Aid Work*, *supra* note 138, at 69.

<sup>140</sup> *Supra* note 99, at 103.



These Committees were mostly concerned with organizational needs. None were devoted to ways of advancing law reform.<sup>141</sup>

The new organization held its first meeting a year later. It adopted a Constitution, which set out as its purposes:

to promote and develop legal aid work, to encourage the formation of new legal aid organizations . . . to provide a central body with defined duties and powers for the guidance of legal aid work, and to cooperate with the judiciary, the bar and all organizations interested in the administration of justice.<sup>142</sup>

Nothing in this statement of purposes points to law reform as a goal for legal aid. Nothing, of course, precluded the new organization from promoting law reform efforts. Therefore, the more important question for this study is how this new organization, which was called the National Association of Legal Aid Organizations, used this new authority.

One major project was to use its power to promulgate record-keeping standards.<sup>143</sup> At the first annual meeting, standard classifications for cases were adopted.<sup>144</sup> This scientific rationalization could be used to advance law reform activities. Indeed, part of the goals of the progressive movement was to

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<sup>141</sup> The seven committees formed were: (1) by-laws; (2) standardization and classification of cases; (3) financial accounting; (4) the public defender; (5) small claims courts; (6) relations with Social Agencies; and (7) relations with the Bar. *Id.* at 103-104. The one possible exception to the statements in the text might be the committee on small claims courts. But even viewing that Committee has having a law reform focus, it amounts to a very narrow slice of reform activities. PROCEEDINGS OF THE FIFTH NATIONAL CONFERENCE OF LEGAL AID BUREAUS AND SOCIETIES 129-30 (1922)

<sup>142</sup> *Constitution of the National Association of Legal Aid Organizations, Article I, Section 2* reprinted in RECORD OF PROCEEDINGS AT THE FIRST ANNUAL MEETING OF THE NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS 115 (1923).

<sup>143</sup> *Id.* at 2. ("The outstanding result of the conference was the adoption of the reports of the Committee on By-Laws and the Committee on Records.")

<sup>144</sup> *Id.* Appendix B. at 125-32 where the classification scheme is set out.

use scientific methods in the service of reform.<sup>145</sup> However, that does not appear to be the case with the National Association of Legal Aid Societies. The standards were primarily aimed at standardizing recordkeeping so that comparisons could be made between various legal aid organizations.<sup>146</sup> Systemization appeared to be an end in itself, not a way of encouraging the development of preventive law.

Both the work of the Association and the speeches and rhetoric at the national meetings support this conclusion. Following the lead of the last meeting of the National Alliance, the work of the Association was largely done in committees. Twelve committees were formed, and no committee was devoted to law reform or preventive law.<sup>147</sup> Moreover the reports of the committees were largely devoted to discussing the mechanics of legal aid practice. For example, the Committee on Records followed its recommendations for uniform reporting with discussing the

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<sup>145</sup> See *supra* note 54.

<sup>146</sup> See *Summary of Report of Committee on Records*, REPORTS OF COMMITTEES OF THE NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS 35 (1923) ("last year the report of this Committee dealt with *what* records we should keep, and gave us a standard classification of data as to clients, and data as to cases which, it was agreed, was to be adopted, and put in operation by each of the Legal Aid Organizations.").

<sup>147</sup> The twelve committees were grouped into four general categories: 1. Committees dealing with Internal Readjustment (Committee on Records and Committee on Financial Accounting); 2. Committees Dealing With Specialized Forms of Legal Aid Work (Committee on the Public Defender, Committee on Domestic relations Courts, Committee on Small claims Courts, Committee on Small Loans and investments, Committee on Relations with International Association of Industrial Accident Boards and Commissions and Committee on Relations with Association of Governmental Labor Officials of the United states and Canada); 3. Committees Dealing with General Contacts Between Legal Aid Work and Other Groups in the Community (Committee on Relations With the Bar, and Committee on Relations with Social Agencies); and 4. Miscellaneous Committees (Committee on International Legal Aid Work and Publicity Committee). *National Association of Legal Aid Organizations—Secretary's Report for the Fiscal Year 1924-1925* reprinted in 22 LEGAL AID REVIEW 1 (April, 1925).

need for accurate recording of information.<sup>148</sup> Good practice certainly requires accurate recordkeeping, but nowhere in the report is there a discussion of what is to be done with the information recorded, let alone the idea that it might be used to discern patterns that would be useful for practicing preventive law.<sup>149</sup>

The major exception to this pattern was the Committee on Small Loans and Investment.<sup>150</sup> This Committee noted in its 1926 report, “it is very desirable for legal aid societies to handle considerable volume of litigation relative to small loans and investments [because] [t]he greater number of clients collected in one office, the greater the amassed evidence and the more effective use of witnesses in groups” to aid in criminal prosecution or civil suits.<sup>151</sup> The Committee also recommended adoption of small loan legislation.<sup>152</sup> However, the report of the previous year created ambiguity as to who should be responsible for these legislative efforts. It stated that extensive legislative work “must necessarily be left in the hands of such organizations as the Russell Sage Foundation and the American Industrial Lenders Association.”<sup>153</sup> Moreover, discussion of legislative reform

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<sup>148</sup> See *Committee on Records supra* note 146, at 35.

<sup>149</sup> The forms used required detailed information about the “nature” of the case, source and disposition. Nowhere was information collected about whether there were similar cases in the office. As to disposition there was no place to record whether the case should lead to legislative efforts or be grouped with similar cases. *Id.* at 57-62.

<sup>150</sup> Leonard McGee, *Introduction*, FIRST ANNUAL MEETING *supra* note 142, at 1, 3 (1923) (Committee on Small Loans is to study the loan shark and other dishonest practices from a national perspective to determine best way legal aid organizations throughout the United States can solve problems in this area.)

<sup>151</sup> *Report of the Small Loans and Investment Committee*, record of proceedings at the fourth annual meeting of the national association of legal aid organizations 259-60 (1926).

<sup>152</sup> *Id.* at 260.

<sup>153</sup> *Report of Committee on Small Loans and Investments*, record of proceedings at the third annual meeting of the national association of legal aid organizations 106 (1925).

efforts was largely limited to small loans and was never put into a larger discussion of the importance of legal aid having a law reform agenda.<sup>154</sup>

It is possible that the Committees of the National Association were mainly concerned with the necessary infrastructure and coordination work, but that the Association still was concerned with advancing the ideals of preventive law espoused at the conventions of the National Alliance. The only difficulty with that theory is there is no evidence to support it. A review of the proceedings of the national conventions held during the 1920s reveals almost no attention to law reform or preventive law. Consistent with developments in Chicago, Boston and New York, the Association, rather than building on the rhetoric of preventive law advocated in speeches at the annual meetings of its predecessor, the National Alliance, abandoned this rhetoric. The focus was on recordkeeping, finances, and eligibility con-

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<sup>154</sup> There are sporadic references to other legislation scattered throughout the reports from 1923-1930, but similar to discussions of small loan legislation, none of these are put into a larger context of law reform or preventive law. See, e.g. RECORD OF PROCEEDINGS AT THE FOURTH ANNUAL MEETING OF THE NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS 33-34 (1926). (one paragraph reference to a Model Wage Payment law.) At the same meeting there is a discussion about monitoring state legislation and perhaps having a state committee to foster legal aid legislation. *Id.* at 67-68. Also in 1926 there is a reference from the Committee on Arbitration about legal aid bureaus being in the forefront of advancing arbitration. *Report of Committee on Arbitration, Conciliation and Small Claims Courts, Id.* at 112, 117. In 1927 a committee recommended that willful neglect on the part of an employer to pay wages should be made a misdemeanor. *Special Report on Methods of Collecting Judgments* in NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS, REPORT OF COMMITTEES 1926-1927. 73, 93 (1927). Again this recommendation is made in one paragraph without further discussion.

cerns.<sup>155</sup> Preventive law has now become akin to an annual medical check-up.<sup>156</sup> It is no longer a means to reforming injustice.

### III. WHY THE SHIFT FROM LAW REFORM: SMITH AND THE ABA

The evidence shows a shift in the work and aspirations of legal aid during the 1920s. This section and the next look at the question of why. What might explain not taking up the invitation Smith advanced in 1919 to build on the achievements of the previous years, including the aspiration toward preventive law?<sup>157</sup> In order to answer that question we must start with Smith's study of legal services, *Justice and the Poor*. I start with Smith because his study was published in 1919, a critical time for this article. Moreover, for some, Smith and his study provide an important explanation for the abandonment of law reform efforts during the 1920s. After looking at Smith, I turn to the ABA because, along with Smith, the actions of the ABA have also been considered a reason why legal aid in the 1920s turned away from preventive law. In the next section I consider two other possible explanations: (1) the need for funding and (2) social and historical context.

<sup>155</sup> The Secretary of the Association stated in 1927, five years after its formation, the work it does is of three sorts: (1) encouraging the formation of new legal aid organizations; (2) providing a central body for the guidance of legal aid work; and (3) "co-operating with the judiciary, the bar, and all organizations interested in the administration of justice." Secretary's Report for the Period Ending June 30, 1927 published in NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS, REPORT OF COMMITTEES 1926-1927 at 26-27. In discussing what it means to provide guidance the Secretary stated it meant establishing minimum standards for recordkeeping; encouraging organizations that were slipping into trouble; and exchanging information about legal aid particularly to groups that do not know about it or to individuals in areas where there was no legal aid office. *Id.* at 32-38.

<sup>156</sup> EMERY A. BROWNELL, *supra* note 18, at 49.

<sup>157</sup> See *supra* note 101.

### A. *Justice and the Poor*

The Carnegie Foundation commissioned *Justice and the Poor*. It was part of a series of monographs, which the Carnegie Foundation sponsored, including several on the professions and was the second in a series of studies of legal education and cognate matters.<sup>158</sup> In writing *Justice and the Poor*, Smith visited every legal aid office in the country. He had a standardized set of questions and data he wanted to cover.<sup>159</sup> The report is divided into three principal parts: Part I, “The Existing Denial of Justice to the Poor,” discusses three principal defects in the administration of justice: delay, court costs and fees and lack of access to a lawyer, Part II discusses agencies that as Smith phrased, were aimed at “Securing a More Equal Administration of the

<sup>158</sup> Henry S. Pritchett, *Introduction* in SMITH, JUSTICE AND THE POOR, *supra* note 13, at xvii. The report was prepared under the guidance of a three person committee consisting of Richard Hale, a founding partner at Hale & Doer, Brinson Winthrop of the New York Bar and Felix Frankfurter, teaching at Harvard at the time. *Report of the General Counsel*, in SIXTEENTH ANNUAL REPORT, *supra* note 68, at 16. According to Smith most of the work on the Advisory Committee was done by Hale. Letter of Reginald Heber Smith (RHS) to Dr. Clyde Furst of the Carnegie Foundation dated May 1, 1919 in *Justice and the Poor Correspondence 1913-1921*, (Harvard Law School Archival collection) (“[Hale] was really the whole of the advisory committee. Mr. Winthrop was always courteous, but was not active. Professor Frankfurter did nothing except write one or two letters.”) Michael Grossberg argues that *Justice and the Poor* was written in part to win bar support for legal aid. But he offers no evidence to support that proposition. Grossberg, *supra* note 17, at 331. It may be that by the time it was published Smith was interested in getting bar support for legal aid, but it is hard to fathom why the Carnegie Foundation would commission a work with that goal.

<sup>159</sup> Letter from Reginald Heber Smith to Richard Hale (Nov. 21, 1916) in *Justice and the Poor Correspondence*, *supra* note 158. See Smith, *supra* note 13, at 54-55 (Smith writes that he visited fourteen cities and that in each city his work ran along three main lines: first, a study of the legal aid organization; second, a study of matters closely related to legal aid work such as small claims courts; public defenders etc.; and third, a study of wage laws and domestic relations laws and courts administering these laws because the two greatest difficulties the poor face are unpaid wages and domestic problems.).

Laws,”<sup>160</sup> and Part III, the heart of the report for my purposes, reviews legal aid work in the United States. This last section was part history, part statistical data, part description, and part prescriptive.

In the first part of *Justice and the Poor*, Smith states, “the substantive law, with minor exceptions is eminently fair and impartial.”<sup>161</sup> He then goes on to conclude, “[i]n sharp contrast, there are grave defects in the administration of the law. It is the wide disparity between the ability of the richer and poorer classes to utilize the machinery of the law which is, at bottom, the cause of the present unrest and dissatisfaction.”<sup>162</sup> In reaching this conclusion, he absolves anybody of responsibility for this disparity and seems concerned to not be accused of engaging in class warfare. He states:

The present inequalities and defects in the administration of justice are not the result of any deliberate intention. No dominating group or class has consciously set out to foreclose the rights of the poor.<sup>163</sup>

Some have relied upon these conclusions drawn by Smith in *Justice and the Poor* to support the thesis that Smith and *Justice and the Poor* were a primary cause of legal aid abandoning any efforts toward law reform in the 1920s. For example, Phillip Merkel states:

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<sup>160</sup> *Id.* at 41-104 (In this part he looked at small claims courts; conciliation; arbitration; domestic relations courts; and administrative tribunals.). See SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at pp. 41-104.

<sup>161</sup> *Id.* at 15.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 15. In other parts of *Justice and the Poor* Smith does not absolve the organized bar of responsibility. He states by virtue of their work legal aid organizations are helping perform the bar's obligation to the weak and oppressed. Hence the bar owes something back to legal aid. According to Smith the bar has been indifferent to legal aid and has not given it adequate support. In the future, the bar, however, should be the chief financial support for legal aid. *Id.* at 237.

Ironically, Reginald Heber Smith, the person remembered as the founder of the modern legal aid movement, played a predominant role in this new conservative direction in legal aid work. In *Justice and the Poor*, he set forth the philosophy that guided legal aid policy for decades to come: the substantive law was fair; the disillusionment of the poor with the legal system reflected a lack of access to justice; and the access problem could be solved by expanding legal aid and making other procedural revisions in the administration of justice.<sup>164</sup>

I agree that these parts of *Justice and the Poor* can be seen as supporting a conception of legal aid as limiting itself to individual cases and promising no more than remedying lack of access to court.

It is also fair to say that *Justice and the Poor* can be and was read in a different way.<sup>165</sup> There is more in the book. Smith does not abandon his ideas of preventive law. He celebrates those

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<sup>164</sup> See Merkel, *supra* note 11, at 5. Compare KATZ, *supra* note 11, at 37 where he attributes Smith's influence toward a less progressive legal aid to his 1916 speech on preventive law. See *supra* note 97 for further discussion of Katz's views.

<sup>165</sup> See Ronald Pipkin, *Legal Aid and Elitism in the American Legal Profession, Introductory Essay* in R. SMITH, *JUSTICE AND THE POOR* xi (reprint of Third Edition, 1972) (referring to *Justice and the Poor* as a reformer's tract). Pipkin also states that although Smith stated his case with the "fervor of a revolutionist," he "was not a radical or revolutionary because he saw no class bias in the law." See also AUERBACH, *supra* note 15, at 59 (*Justice and the Poor* was an "indictment of class injustice as a pervasive aspect of American law and life"). Compare DAVIS, *supra* note 9, at 16 ("Smith's report [referring to *Justice and the Poor*] might easily have led to a broad reexamination of the legal system.") Davis, however, argues that Smith's conclusion that the legal system was fraught with class injustice was diluted with Smith's acquiescence. She offers not support for this conclusion except for the inclusion of Elihu Root's introduction. The evidence is that the Carnegie Foundation wanted Root's introduction. See *infra* notes 173-175.



ideas in a chapter on *Legal Aid and the Community*.<sup>166</sup> Smith makes clear, in this chapter and the preceding chapter on *Legal Aid and the Law*, that legal aid is not limited to access to justice. Legal aid can make “an important contribution toward preserving the fairness of substantive law.”<sup>167</sup> He discusses what he calls a new movement in the realm of law which will prove of incalculable benefit and which legal aid organizations are likely to play an important part. Again, he uses the label “preventive law.” He repeats his ideas that advocates should use caseload data to ascertain problem areas and then develop solutions.<sup>168</sup> As he argued elsewhere,<sup>169</sup> those solutions can be appellate cases, legislative reform proposals and community education.<sup>170</sup> He illustrates this argument with examples of what legal aid has already accomplished. He does not limit his examples to procedural reforms, but also discusses substantive law reforms such as those directed at loan sharks and other fraudulent schemes. He also points to campaigns to protect immigrants and community education efforts.<sup>171</sup>

The reaction to *Justice and the Poor* supports these multiple readings. Prior to its publication, the Carnegie Foundation was concerned that negative reaction on the part of the bar might affect support for both the monograph and the Carnegie Foundation.<sup>172</sup> In order to guard against that, it sought to have Elihu

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<sup>166</sup> SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at 210.

<sup>167</sup> *Id.* at 205.

<sup>168</sup> *Id.* at 214-17.

<sup>169</sup> Smith, *Preventive Law*, *supra* note 58.

<sup>170</sup> SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at 215-16.

<sup>171</sup> These aspirations toward law reform are tempered at the end of the chapter on *Legal aid and the Community* where Smith discusses his concern with social unrest. See *id.* pp. 217-218. By providing access to law American institutions would be strengthened and radicalism would be made less attractive. Jerold Auerbach discusses these alternative readings of Smith. See AUERBACH, *supra* note 15 at, 59-60.

<sup>172</sup> Memorandum by Alfred Reed dated Dec. 24, 1919 in *Justice and the Poor Correspondence*, *supra* note 158. Some accused the Carnegie Foundation of betraying its class.

Root, the quintessential establishment lawyer, write a foreword.<sup>173</sup> Root's foreword is rather tepid,<sup>174</sup> but it helped the Carnegie Foundation achieve the goal of presenting *Justice and the Poor* as within the mainstream of establishment thought without requiring any change in the actual text or message.<sup>175</sup> There were also a variety of reactions to *Justice and the Poor* ranging from support to critique of it as a radical document.<sup>176</sup> A prominent example of this latter reaction was an extremely critical editorial in the New York Times.<sup>177</sup>

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<sup>173</sup> *Id.* Root in addition to being a prominent New York corporate lawyer had been Secretary of War for President McKinley; Secretary of State for President Theodore Roosevelt; and a United States Senator, elected in 1909. See Jonathon Zasloff, *Elihu Root* in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, Roger K. Newman Ed. (2009).

<sup>174</sup> Root's introduction focused on legal aid as a solution to problems of Americanization and immigrants rather than as a solution to injustice.

<sup>175</sup> Alfred Reed Memorandum *supra* note 172. Reed states Smith is part of a rather radical crowd and that underneath talk about Smith's youth lies questions about who is this man. "Root's endorsement via a forward would be the best counter to this criticism." See also Reed's letter of July 29, 1918 where he states the title "Justice and the Poor" might suggest the enthusiastic reformer, but we might as well keep it because one type of reader will be attracted by Root despite the title and another reader will be attracted by "dangerous sounding title" despite dislike for Root. Letter of Alfred Z. Reed to Henry S. Pritchett, President of Carnegie Foundation dated July 29, 1918 in *Justice and the Poor Correspondence*, *supra* note 158.

<sup>176</sup> Letter of Dec. 6, 1919 by Wm. D. Gurthrie strongly criticizing *Justice and the Poor* "contents seem to me to show lack of experience and want of sound judgment in generalizing from isolates instances" in *Justice and the Poor Correspondence*, *supra* note 158. Letter by Smith to John R. Davies Justice of the Municipal Court of the City of New York dated Nov. 6, 1919 refuting criticism that he was criticizing judges in *Justice and the Poor* in *Justice and the Poor Correspondence*, *supra* note 158; letter criticizing report April 11, 1918 from J. F. Bowie to Association of Bar of New York city "I do not believe publication of the book desirable." It does not justify conclusion system unfair to the poor. *Justice and the Poor Correspondence*, *supra* note 158.

<sup>177</sup> New York Times editorial of Dec. 26, 1919 attacking *Justice and the Poor*. See also *Editorial*, 5 VA. L. REGISTER 635 (1919-20) ("a great deal of time and talent have been wasted and a very useless discussion taken place of over the question of the failure of the poor to obtain impartial justice in the courts.").

Even if *Justice and the Poor* is considered to have a predominantly conservative message, there is one other problem or issue to confront. It is not only that *Justice and the Poor* can be read in different ways, but, as discussed earlier, Smith in other writings and speeches is one of the primary proponents of preventive law. These writings had to be familiar with the individuals who were involved in legal aid. There were speeches at national conventions and articles in publications, such as the Legal Aid Law Review.<sup>178</sup> What Smith accomplished in Boston was widely known within the legal aid community (Smith was neither shy nor modest in publicizing his achievements).<sup>179</sup> If one suggests that Smith's influence and emphasis on access led to the retreat of the 1920s, there needs to be further explanation. I am not arguing that *Justice and the Poor* cannot be interpreted as primarily promoting access to justice; however, given that there were other possibilities, the question is, why were they ignored? Why was the more conservative element of Smith's vision the model for legal aid in the 1920s rather than the more progressive aspects?

One explanation is that Smith, himself, advocated a more conservative vision of legal aid in the 1920s. Assuming this characterization as accurate, it raises the question that is the subject of this section in a slightly different form. Rather than trying to understand what forces caused legal aid to change, the question would be what caused Smith to change? If the reasons are the same, as I believe they are, focusing on Smith's changes during the 1920 does no more than tell us Smith was subject to same forces during the 1920s as legal aid in general.<sup>180</sup> Moreover, that is not the argument that critics of *Justice and the Poor* make.

<sup>178</sup> See, e.g., *infra*.

<sup>179</sup> JOHN DOLAN, *supra* note 53, at 217 describes Smith as "never a shy one."

<sup>180</sup> An alternative explanation for Smith's more conservative outlook would be that after he left the Boston Legal Aid Society he joined an establishment law firm. This might explain some of his views during the 1920s, but cannot explain *Justice and the Poor* since that was written prior to his joining Hale & Doer.

The arguments supporting the thesis about Smith and the work of the legal aid during the 1920s rely not on Smith's writings during the 1920s, but on the content of *Justice and the Poor* and timing. *Justice and the Poor* was published in 1919 and the changes in legal aid occurred during the 1920s. This is suggestive, but hardly conclusive. Even Smith's critics acknowledge other factors were at work.

### ***B. American Bar Association***

The second major hypothesis about the changes in the 1920s is the influence of the American Bar Association (ABA) as the critical factor. In the 1970s, Jerold Auerbach wrote an influential book, *Unequal Justice*, in which he discussed what he saw as the conservative influence of the organized bar, particularly the ABA, on legal services during this period.<sup>181</sup> Phillip Merkel, in addition to discussing the effect of *Justice and the Poor* on legal aid, also argued that the ABA in the 1920s co-opted legal aid for its own conservative purposes.<sup>182</sup> This argument about the ABA's influence, again, relied heavily on correlation between certain events. Legal aid became more conservative during the 1920s and the American Bar Association first demonstrated strong interest in legal aid at its 1920 convention.<sup>183</sup>

<sup>181</sup> AUERBACH, *supra* note 15, at 60-65. Auerbach discusses how the Bar corrupted Smith's message and focused on only part of it, the need for Americanization of immigrants and the combatting of Bolsheviks.

<sup>182</sup> Merkel, *supra* note 11, at 24-28.

<sup>183</sup> Scott Cummings makes this argument in a different form. He states:

Stung by the 1919 publication of Reginald Heber Smith's *Justice and the Poor*, which denounced the glaring inequality in legal services, the bar took on a greater role in funding legal aid, stimulating its notable expansion over the next forty years. Yet bar support placed operational constraints on legal aid work: Controversial clients were generally avoided, cases that could generate fees were rejected, and client income eligibility was maintained at levels acceptable to private attorneys competing for lower-income clients. These limitations, combined with those imposed by charitable and local business funders,

The earliest expression of interest by the ABA in legal aid was in 1917 when the Conference of Delegates on State and Local Bar Associations adopted a resolution that state and local bar associations should be urged to foster “the formation and efficient administration of legal aid societies.”<sup>184</sup> It was not until 1920, however, that the ABA devoted substantial time at its annual meeting to legal aid.<sup>185</sup> There is some debate about the motive for this interest. Some argue that it was the need to bolster the image of lawyers as public-spirited and devoted to democratic values as opposed to simply being an elitist profession subservient to business interests.<sup>186</sup> Others contend that the newfound concern with legal aid was the bar’s fear of Bolshevism and the need for Americanization of immigrants.<sup>187</sup> These are not mutually exclusive explanations; as both could be true.<sup>188</sup> Regardless of its motives, proving that the ABA had its own

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confined legal aid work within narrow professional boundaries.

Legal aid lawyers abjured reform-oriented advocacy and instead concentrated on resolving minor individual disputes.

Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 12-13 (2004). It is unclear whether he is arguing the Bar placed explicit limitations on legal aid in exchange for its funding or legal aid conformed to what the Bar desired in order to obtain funding. See pp. - *infra* for the latter argument.

<sup>184</sup> See John S. Bradway, *The Work of Legal Aid Committees of Bar Associations* 12 (1938). Prior to this time civil legal assistance was not on the agenda of the ABA. See m. Louise Rutherford, *The Influence of the American Bar Association on Public Opinion and Legislation* 102 (1939).

<sup>185</sup> See BRADWAY, *supra* note 184, at 12.

<sup>186</sup> See Ronald Pipkin *supra* note 165, at xvi-xvii. See also *Report of the Special Committee on Legal Aid Work*, REPORT OF THE FORTY-FOURTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 493 (1921) stating that one of its reasons for the ABA to have a Standing Committee on Legal Aid was that “We are of the opinion that no action could be taken by the Association which would be more beneficial in arousing popular interest in and approval of the work of the Association.” *Id.* at 496-97.

<sup>187</sup> AUERBACH, *supra* note 15, at 60-61. See also Davis, *supra* note 9, at 15 agreeing with Auerbach.

<sup>188</sup> See John Kilwein, *The Decline of the Legal Services Corporation: “It’s Ideological Stupid”* in *THE TRANSFORMATION OF LEGAL AID* 41 (Francis Regan, Alan Patterson, Tamara Goriely and Don Fleming, 199) at 51 discussing the ABA’s support of funding for the Legal Services Corporation and con-

motives for devoting attention to legal aid does not necessarily mean the ABA influenced the direction of legal aid in the 1920s away from law reform.

Evidence supporting the conclusion of ABA influence comes from a speech that Charles Evan Hughes gave at the 1920 convention.<sup>189</sup> Hughes stated that the scope of service of a legal aid association should be commensurate with its exigency. By that, he appeared to mean legal aid organizations should provide access to court and no more. Furthermore, according to Hughes, not only is the legal aid organization not intended to enter into competition with the bar, it does not serve the cause of justice to be litigious. A primary function of the legal aid organization is conciliation. Its purpose is not to stir up strife, but to allay it. Moreover, for Hughes, the reasons to support legal aid organizations were not to achieve social justice. The legal aid society could help lawyers discharge their obligations to the poor, and, perhaps most significantly given the times, help prevent spreading the seeds of Bolshevism.<sup>190</sup>

These sentiments of Hughes are not conducive to a law reform or preventive law strategy. The question, however, is even if we attribute Hughes' sentiments to the ABA,<sup>191</sup> how did the

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cluding "it is impossible to untangle mercenary motives from a general concern for more equitable access to society's civil courts."

<sup>189</sup> Charles Evan Hughes, *Justice and the Poor—Legal Aid Societies, their Function and Necessity*, reprinted in 18 LEGAL AID REVIEW NO. 4, 1 (October, 1920). See AUERBACH *supra* note 15, at 60 referring to the Hughes speech as influential.

<sup>190</sup> Hughes, *Justice and the Poor*, *supra* note 189, at 6.

<sup>191</sup> To the extent one can measure the views of a multi-member-organization, the ABA was probably sympathetic to the conservative part of Hughes' views. The original impetus for the founding of the ABA was more rooted in the ideals of professionalism than an economic or political agenda. See John A. Matzko, "The Best Men of the Bar": *The Founding of the American Bar Association in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 75, 76 (Gerard W. Gawalt ed., 1984). Professionalism included purging the bar of its undesirable elements and worries about immigrants tainting American ideals. Moreover it is likely that by the 1920 the ABA was a more conservative organization. For example in 1922 a Special Committee

ABA exert its influence on legal aid organizations throughout the country which were local organizations? The ABA did not have accreditation standards that legal aid organizations had to comply with to exist or become recognized. Therefore, we need to develop theories about how the ABA might have influenced the direction of legal aid.

One possibility is to look to the following year, 1921. In 1921, the ABA established its first standing committee on legal aid work, and throughout the decade, the ABA Standing Committee worked to expand legal aid.<sup>192</sup> This is the same decade where legal aid largely abandoned any notions of preventive law or law reform. Correlation, however, does not mean causation. Similar to the questions regarding Smith and *Justice and the Poor*, we need a more robust explanation of exactly how the ABA's interest and the work of the standing committee resulted in legal aid becoming more conservative. Moreover, any explanation has to show not only how the Committee exercised some element of control or at least influence over local legal aid organizations, but also the direction of that influence or control.

As to the first of these elements, control or influence, we run into the problem we had with the ABA writ large. Absent accreditation standards, what devices for control could the Committee use? As Smith wrote, "[i]t did not take the Committee

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on American Citizenship was appointed. Part of its charge was "stem the tide of the radical attack on the Constitution, laws, courts, law-making bodies, executive and flag." RUTHERFORD *supra* note 184, at 116 citing REPORT OF THE FORTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 416 (1923). See also REPORT OF THE FORTY-SECOND ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 69 (1919) where the ABA Committee to Oppose Judicial Recall asked for approval of a campaign to oppose "subversive and socialistic doctrines."

<sup>192</sup> Up until 1936 the ABA functioned largely through its Executive Committee and various standing and special committees. In theory the Executive Committee set policy which was carried out by the committees. After 1936 the House of Delegates became the policy making body. See RUTHERFORD *supra* note 184, at 13-14. After establishing the Standing Committee there is no record of Executive Committee involvement in legal aid during the 1920s.

long to realize it could not, and should not, try to superintend the multifarious activities of all the legal aid organizations in the country.”<sup>193</sup> A more promising possibility is discussed by Smith when he states: “people actively interested in legal aid have come to regard the Standing Committee on Legal aid . . . as the body best fitted to determine matters of general policy.”<sup>194</sup> Perhaps the Committee did not exercise direct control, but influenced local legal aid organizations via these policy pronouncements. Even if we accept this conjecture about influence, we have to trace the direction of that influence. To what extent did the ABA Standing Committee use what influence it had over legal aid to squelch law reform efforts?

The two main tasks of the Standing Committee were: (1) encouraging legal aid organizations to come together to form their own national organization and (2) making the organized bar feel a keener and more lively sense of responsibility for the welfare of legal aid work.<sup>195</sup> Taking these tasks at face value, they are neutral as to law reform—neither encouraging it nor discouraging it. If we look to the work of the Standing Committee, the

<sup>193</sup> Reginald Heber Smith, *Interest of the American Bar Association in Legal Aid Work* 205 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 108-09 (1939). One of the Standing Committee’s charges was to assist the legal aid movement obtain the services of lawyers of national prominence “who through their leadership could help in charting the course to be followed and rules to be observed.” REPORT OF THE FORTY-FOURTH ANNUAL MEETING, *supra* note 186, at 496. Conceivably this could have been a way to influence legal aid, but there is no evidence that the Committee followed through on this mandate.

<sup>194</sup> Smith, *Interest of the American Bar Association*, *supra* note 193, at 111.

<sup>195</sup> REPORT OF THE FIFTY-SECOND ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 380 (1929). The Special Committee that had been formed to consider the possibility of a Standing Committee gave five reasons for recommending a Standing Committee:

1. There is a direct responsibility, both civic and professional, on members of the bar to see to it that no person with a righteous cause is unable to have his day in court because of his inability to pay for the services of counsel.
2. This responsibility is best met by members of the Bar acting, not as individuals, but in their collective capacity and through their recognized associations.



reports of the Committee show that it considered issues such as, “[w]ho is a legal aid client and who should be referred to other lawyers?” and whether legal aid should accept divorce cases, criminal cases and personal injury cases.<sup>196</sup> Issues such as these were with legal aid from the beginning and to some extent symbolize a conservative approach to providing legal services because the main focus of these issues is determining who is a worthy client and avoiding competition with the bar. However, there is scant evidence of the ABA standing committee discouraging law reform or preventive law. In reviewing eleven years of reports, 1922 to 1932, the one reference I found that could be interpreted as discouraging reform efforts was a statement in the 1925 report that “little if any change in substantive law is necessary, what is required is better procedure.”<sup>197</sup> At times the Com-

3. Legal aid and advice to poor persons are most efficiently and economically secured, at least in the larger cities, through the existing agencies specially created and adapted for this purpose, called legal aid organizations.

4. There should be, therefore, a direct relationship between the American Bar Association and legal aid work in its national aspects and as a national movement.

5. This relationship is of a permanent and continuing nature and should be recognized as such by the creation of a standing or annual committee which should each year report to the Association as to the progress, the needs, the advantages and the shortcomings of legal aid work in the United States.

*Report of Special Committee on Legal Aid Work*, REPORT OF THE FORTY-FOURTH ANNUAL MEETING, *supra* note 186, AT 493-94.

<sup>196</sup> The National Association of Legal Aid Societies submitted five questions to the ABA Standing Committee:

1. Who is a Legal Aid Client, and who should be referred to other lawyers?
2. To what other lawyers should such persons be referred?
3. Should Legal Aid Organizations take divorce cases?
4. Should Legal Aid Organizations take criminal cases?
5. Should Legal Aid Organizations take personal injury cases where private lawyers could be secured on contingent fee basis and only on that basis?”

American Bar Association, *Report of the Committee on Legal Aid Work*, published in 21 LEGAL AID REVIEW, NUMBER 3, 4-5 (July, 1923).

<sup>197</sup> 50 REPORTS OF THE AMERICAN BAR ASSOCIATION (1925) at 451; BRADWAY, *supra* note 184, at pp. 12-27, summarizes the reports of the Committee from 1921 to 1937 for those who want to consult a secondary source detailing the work.

mittee even ventured into law reform by proposing model statutes such as a model statute for collection of wage claims and a model *in forma pauperis* statute.<sup>198</sup> The latter statute was quite progressive. It went beyond the typical statute that provided for waiver of court fees and provided for appointment of counsel in all civil cases, either through provision of a legal aid attorney or, when legal aid was not available, a private attorney. This is a position we still have not arrived at today.<sup>199</sup> Therefore, if there was an attempt by the Standing Committee to discourage preventive law, it is hard to find evidence of it in the records of the Committee during the 1920s. Perhaps the relative lack of attention to preventive law or law reform influenced local legal aid organizations to put all of their resources into individual casework. This is a possible conclusion, but it is a less powerful explanation than a thesis that the ABA actively discouraged law reform efforts.

However, even if the ABA or its Standing Committee did not directly control or influence legal aid in the 1920s to become more conservative, there are two more theories worth exploring. Both of these theories rely upon control via intermediaries. One possibility is that the ABA exercised its influence via state or local bar associations, which then were influential in directing local legal aid organizations. Another possibility is that the

<sup>198</sup> Report of the Forty-Eighth Annual Meeting of the American Bar Association 323-325 (1927).

<sup>199</sup> A state-appointed lawyer is available in criminal cases. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (requiring court-appointed counsel for most criminal defendants). But only in rare cases will counsel be provided by the state in civil cases. See *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (holding that appointment of counsel for indigent defendant in contempt hearing is not necessary if other appropriate protections are provided). See also Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 St. Louis U. L. J. 917, 975 (2012) (describing the “Civil Gideon” movement as an “effort . . . [which] aims to guarantee counsel rights for certain categories of impoverished [civil] litigants.”)

ABA exercised control via its relationship with the National Association of Legal Aid Organizations.

There is some evidence for the hypothesis that the ABA exercised control over legal aid via state and local bar associations. In 1922, the ABA standing committee recommended that state and local bar associations “be encouraged to appoint a standing committee on legal aid work.”<sup>200</sup> More significantly, it recommended that once a year the standing committee of the local bar association inspect the legal aid organization and report its findings to the bar association.<sup>201</sup> Both inspections and reports can be methods of control or influence, particularly where the legal aid organization needs the support of the local bar for funding and legitimacy. It also added the suggestion that the Bar Association Committee “settle such matters of policy as the legal aid organization may refer to it.”<sup>202</sup> It then gave as examples of such policy matters as whether divorce cases and personal injury cases should be accepted and where the line should be drawn of improper competition with the bar.<sup>203</sup> In its last recommendation it stated the bar should “cooperate with the legal aid organization in their broader work of securing remedial legislation and improving the administration of justice.”<sup>204</sup> This leaves us with some of the same questions discussed in connection with Smith and the ABA: (1) Which of these mixed set of recommendations were followed? and (2) How did local bar committees exercise control over organizations which in theory were independent?

The most complete record on these questions comes from a study in 1938 of the work of legal aid committees of local bar associations conducted by John Bradway.<sup>205</sup> Bradway primarily

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<sup>200</sup> *Report of the Committee on Legal Aid Work*, Report of the Forty-Fifth Annual Meeting of the American Bar Association 402 (1922).

<sup>201</sup> *Id.* at 409.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 410.

<sup>205</sup> BRADWAY, *supra* note 184.

looked at the reports issued by state bar and local bar associations. To that extent, his study focuses more on recommendations by bar associations and frequently does not tell us whether those recommendations were followed and, if so, how they were implemented. Still his study is the most complete picture available.<sup>206</sup> Twenty-one legal aid committees of state bar associations were active as of 1938, but only six of these were active before 1930.<sup>207</sup> Another seven were active at some time during the 1920s but had become inactive by the time Bradway conducted his study.<sup>208</sup> Of the thirteen state bar associations that had legal aid committees active at some point during the 1920s, a number of them refer to the ABA as an impetus for their own work.<sup>209</sup> The actual work is varied: statements of general principles, gathering statistics, surveying other jurisdictions, including international programs, and, in some instances, handling cases. The main work was simply recommending that local bar associations establish legal aid committees and trying to encourage attorneys to financially support legal aid.<sup>210</sup> There is no evidence of trying to suppress law reform efforts and to the extent there is any mention of such efforts it is to encourage it.<sup>211</sup>

<sup>206</sup> BRADWAY states in his Introduction that "Nothing else has been published on this subject." *Id.* at IX.

<sup>207</sup> *Id.* at 43. The six were Louisiana, New York, Illinois, Pennsylvania, California and Michigan. Bradway also includes the New York Public Defenders Committee in his list, but including that entity would be double counting New York. It is also not relevant to my interest in civil legal aid.

<sup>208</sup> *Id.* at 42. These seven were Connecticut, Wisconsin, New Jersey; Ohio; Georgia, Alabama and Massachusetts. Three of these, New Jersey, Ohio and Georgia, appear to have been only active for a year.

<sup>209</sup> See e.g. New York, *Id.* at 49; Pennsylvania, *Id.* at 60.

<sup>210</sup> *Id.* at 42-104. Bradway concluded that the activities of legal aid committees of State Bar Associations have not gone much beyond the stating a principle and urging local groups to do their part. *Id.* at 119.

<sup>211</sup> In Michigan the 1928 report lists efforts to support a "Poor Litigant's Statute", frame better laws on wage claims, and find ways of reducing the high cost of litigation to poor litigants. *Id.* at 70. In California the State Bar Association recommended that the Association and all local bar associations "should cooperate with legal aid societies in securing remedial legislation and improving the administration of justice." *Id.* at 74.

Bradway's report also looks at local bar associations. Perhaps that is where control was exercised. One problem, however, is that we have even less evidence of what was being done at the local level than at the state level. As Bradway states, "[A]ny attempt to study the work [of local bar associations] is limited by the great number of cities in which legal aid service is rendered, the divergence in local conditions, [and] general lack of committee reports."<sup>212</sup> Nevertheless, to the extent there is evidence, it is consistent with activity at the state level. By and large, local bar association activities were devoted to organizational activities and fundraising for legal aid.<sup>213</sup> The most notable exception was in Detroit where the legal aid bureau was part of the local bar association.<sup>214</sup> It is certainly reasonable to assume that the Detroit Legal Aid Bureau's position within the bar association resulted in the possibility of the bar exerting considerable control over legal aid. The difficulty is ascertaining how that control was exercised. The evidence available from the annual reports simply shows the bar association in 1922 setting out a statement of principles. Although the principles largely ignored law reform, the first principle, to "protect against injustice," could easily include law reform efforts.<sup>215</sup> Moreover, by itself, the example of

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<sup>212</sup> *Id.* at 121.

<sup>213</sup> Bradway states that where local legal aid committees were active they are concerned with creating and maintaining standards, providing moral support, making surveys of the extent and need for legal aid, endeavoring to secure financial support and informing the bar of its obligation. *Id.* at 182. Creating and maintaining standards could be a method of control. However the difficulty is figuring out what Bradway means by this because his description of work of local bar associations do not give any examples of what he means or of such control. He describes the work of local bar associations at *Id.* at 121-181.

<sup>214</sup> *Id.* at 144-45.

<sup>215</sup> The principles were to:

- (1) aid to protect against injustice;
- (2) abstain from supporting unjust or dishonest causes;
- (3) prevent family disruption;
- (4) reject criminal cases except in extreme circumstances;
- (5) avoid competition with the bar;

Detroit does not prove that local bar associations controlled legal aid.

Therefore, in order to further test this theory of limited local control, I return to the three legal aid organizations I discussed earlier: Boston, Chicago, and New York. My own research on the Boston Legal Aid Society does not support the thesis of co-optation by the bar.<sup>216</sup> The Boston Legal Aid Society began as part of the efforts of the elite bar. There is no evidence that the lawyer members of the Board of Directors of the Boston Legal Aid Society objected to or stood in the way of the Legal Aid Society's more progressive work during the period 1914-1920. Nor is there any evidence that the lawyer board members influenced the direction of the Legal Aid Society to abandon law reform efforts during the 1920s. If we look to the Boston Bar Association, it did not have a legal aid committee during the 1920s; therefore, there is no direct evidence of it trying to influence legal aid.<sup>217</sup>

In New York there was significantly more involvement by the local bar association during the 1920s than in Boston. In 1924 the Association for the Bar of the City of New York appointed a special committee to study legal aid.<sup>218</sup> The Committee reported back in 1925. It first identified its charge as meaning: "What can Our Bar Do For Legal Aid in the City of New York?"<sup>219</sup> It then went on say it needed to address a prior question: "What are the concepts beneath the phrase 'Legal Aid'?"<sup>220</sup> It answered its

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(6) charge or accept small fees as condition warrant;

(7) aid other social agencies;

(8) promote legal aid work wherever needed.

*Id.* at 144.

<sup>216</sup> See Spiegel, *supra* note 11.

<sup>217</sup> Bradway, *supra* note 184, at 134 ("there appears to have been no legal aid activity by the organized bar" in Boston).

<sup>218</sup> Bradway, *supra* note 184, at 122. For a general history of the association see MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION (1988).

<sup>219</sup> *Relations of the Bar to Legal Aid*, 23 LEGAL AID REVIEW No. 3, 1 (1925).

<sup>220</sup> *Id.* at 2.

own question by stating that the concepts of legal aid include the securing of impartial laws and equal administration of justice both in a theoretical sense and in “practical realization of justice for the poor.”<sup>221</sup> The report then amplified what it meant by justice for the poor as securing counsel and obtaining adjudication of disputes without delay or expense.<sup>222</sup> To the extent that one views procedural justice as inherently conservative, this conception of legal aid is arguably anti-law reform, at least as it pertains to substantive law. On the other hand, it hardly fits the image of a conservative bar reigning in legal aid. The rest of the report discusses the need for the bar to contribute significantly more financially to legal aid and ends with recommending the creation of a Standing Committee on Legal Aid.<sup>223</sup>

The most important connection between legal aid and the Association was a comprehensive report on legal aid published in 1928.<sup>224</sup> One question for purposes of this Article is how a report issued in 1928 could influence the direction of legal aid throughout the 1920s. Perhaps, however, the report reflected the thinking of the Bar Association during the 1920s and is indicative of the way the Association approached legal aid in previous years. Even accepting that explanation, we have the same question as with other bar associations: what was the direction of the influence or control and how was that control exercised? The report, although much more comprehensive than other bar association reports, is consistent with the summary of Bar Association efforts discussed above. It recommends better cooperation with bar associations, better understanding of legal aid work and increased financial support from the bar.<sup>225</sup> Where it perhaps breaks new ground is that the report also includes recommenda-

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 3-5.

<sup>224</sup> This report was done in conjunction with the Welfare Council of New York. See Report of Joint Committee for the Study of Legal Aid, Association of the bar of the City of New York and Welfare Council of New York (1928).

<sup>225</sup> *Id.* at 141-150.

tions that legal aid remain private rather than government-sponsored, apply a more liberal eligibility standard, better training for staff members and increase salaries to retain experienced attorneys. Arguably, these recommendations intrude upon the independence of legal aid, but even if followed, do not bear on the question of law reform.<sup>226</sup> The closest the report comes to discouraging law reform is where it states, “[l]egal aid should seek the advice of the organized bar.”<sup>227</sup> If you assume the advice of the Bar Association would be to discourage law reform, the recommendation to seek advice is significant. However, the same report also states that legal aid “involves not only the idea of individual justice, but the promotion of social justice.”<sup>228</sup> It then goes on to describe the various methods by which social justice might be advanced: legislation, test cases and cooperation with other agencies.<sup>229</sup>

A stronger argument for where the bar may have made a difference in the direction of legal aid is in Chicago. As part of the changes introduced by legal aid’s consolidation with United Charities, the policies of the Legal Aid Bureau were determined by the Legal Aid Committee of United Charities sitting in joint session with the Legal Aid Committee of the Chicago Bar Association.<sup>230</sup> The best account of the issues brought to the joint meetings is by Marguerite Raeder Gariepy,<sup>231</sup> a senior attorney in charge of the Legal Aid Bureau.<sup>232</sup> Gariepy’s article was published in 1939 and unfortunately she does not state when particular issues were discussed, so I cannot definitely connect her account to the work of 1920s. Still it gives us some idea of the work of these joint meetings. According to her account, repre-

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 147.

<sup>228</sup> *Id.* at 4.

<sup>229</sup> *Id.*

<sup>230</sup> SIXTY SIX YEARS OF SERVICE, *supra* note 103, at 49.

<sup>231</sup> See Gariepy, *supra* note 104. I have been unable to find other records which describe the workings of these joint meetings.

<sup>232</sup> *Id.* at 78.



sentative subjects brought to the joint meetings were such issues as (1) charging a registration fee of 25 cents, (2) compiling a list of attorneys to whom cases could be referred when applicants can pay a fee, (3) establishing Legal Aid policy in bringing suit and providing court costs in forcible entry and detainer cases for clients who have heavily encumbered property and practically no income, or who are on relief, and (4) establishing policy for suing for the recovery of luxuries such as jewels or radios, or for damages to the clients' automobiles.<sup>233</sup> As with other bar association discussions, these issues do not seem conducive to law reform efforts, but do not preclude such efforts. Moreover, when the joint meetings discussed reform efforts, those discussions were supportive. For example, there were discussions of whether certain objectionable practices prevailing before the Industrial Commission could be corrected through the efforts of the Committee in conjunction with the relevant Bar Association Committee, and whether to support certain legislative bills, such as a wage assignment bill, including recommending that the Board of Managers of the Chicago Bar Association endorse the bill.<sup>234</sup> Therefore, although this joint control of the Chicago Legal Aid Bureau by the bar may have played a role in the Legal Aid's Bureau abandonment of law reform during the 1920s, there is no direct evidence to support this conclusion and some evidence to the contrary.

<sup>233</sup> *Id.* at 73-74. There was also discussion of what to do about commercial organizations which use the words "legal aid" in their title was considered at one meeting; whether the Legal Aid Bureau should ask an order for attorney's fees in divorce cases, judgment by confession, and wage claim cases; whether the Legal Aid Bureau should give reports to other social agencies on the standing of various attorneys when requested by the agencies; and criticisms made by the students of the legal clinic course to the effect that the Legal Aid Bureau sometimes handled too trivial matters. *Id.* at 74.

<sup>234</sup> *Id.* at 74. Other bills considered were allowing the appearance of the defendant to be filed as a poor person, a bill providing for the collection of wages under a certain amount by the Department of Labor, and a proposed bill to amend the garnishment law. *Id.*

Even if this joint control arrangement did lead to suppression of law reform efforts, it was put in place by United Charities,<sup>235</sup> the new patron of legal aid in Chicago, and says as much about United Charities' vision for legal aid as a model for control of legal aid by the bar in other cities. To the extent this joint arrangement is similar to other places it is because its motivation was the same: financial considerations. The resolution approving the arrangement where the Legal Aid Committee of the Bar Association would share in governance of the Legal Aid Bureau also stated that the Bar Association Legal Aid Committee was to solicit funds from members of the Chicago Bar Association for the "payment of the salaries of the attorneys of the Legal aid Bureau and also of one clerk and stenographer."<sup>236</sup>

This discussion of Boston, New York and Chicago illustrates, as Bradway stated, that it is difficult to make generalizations. Local conditions mattered. Nevertheless, it is fair to conclude that although there remains the possibility of the ABA or the bar exercising control over legal aid via the intermediaries of state or local bar associations, the evidence is at best inconclusive. A different hypothesis, however, of control through an intermediary would be the bar utilizing the National Association of Legal Aid Organizations (NLAO). Throughout the 1920s, both the ABA and the NLAO discuss the need for close cooperation between these two national organizations.<sup>237</sup> As with the

<sup>235</sup> Garipey states it was in 1922 when this joint control arrangement was started. *Id.* at 73. By 1922 the Legal Aid Bureau was under the control of United Charities. See *supra* note 102.

<sup>236</sup> See SIXTY SIX YEARS OF SERVICE, *supra* note 103, at 50.

<sup>237</sup> At the NLAO's first annual meeting, at the instigation of Smith, the NLAO created a standing committee on relations with the bar and as its first endeavor, the Committee submitted the five questions to the ABA Standing Committee detailed at note 196, *supra*. See Record of Proceedings, *supra* note 142, at 63. The subsequent report of the Committee prepared for the Second Annual Meeting states the "next step will be to call a joint meeting" with the Legal aid Committee of the ABA to answer the five questions. *Report of Committee on Relations with the Bar*, REPORTS OF COMMITTEES OF THE NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS 73 (1923). At

ABA, however, there is the question of how the NLAO exercised control over legal aid. It was not an accreditation body, but a voluntary membership organization. At best, its efforts could influence its members, but it had no way of exerting direct control. Furthermore, even though the NLAO's own policies were not strongly supportive of law reform,<sup>238</sup> the question is not the NLAO's own policies, but whether the bar exercised control over legal aid via the NLAO. The NLAO had a close working relationship with the ABA's Standing Committee on Legal Aid.<sup>239</sup> It also continually encouraged legal aid to become more involved with local bar associations.<sup>240</sup> If cooperation between the NLAO and the bar mattered, it is through control via the ABA Standing Committee or through local bar associations. As discussed above, there is reason to question how strong a role those devices played in the direction legal aid took in the 1920s and therefore reason to question the theory that the bar was directly responsible for suppressing legal aid's law reform efforts.<sup>241</sup>

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the fourth annual meeting, the Committee on Relations with the Bar reported that although it had received no response to its original five questions, it submitted an additional five questions. NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS, RECORD OF PROCEEDINGS AT FOURTH ANNUAL MEETING HELD AT NEW YORK 229 (1926).

<sup>238</sup> See *supra*.

<sup>239</sup> See *supra* note 237.

<sup>240</sup> At the NLAO 1930 convention, the NLAO's Committee on Relations with the Bar stated, in reviewing its work over the past eight years, that efforts to bring legal aid into closer relations with the Bar have for the most part taken the form of urging upon Bar Associations the appointment of standing committees on legal aid. NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS, RECORD OF PROCEEDINGS AT EIGHTH ANNUAL MEETING HELD AT DENVER, COL. 48-49 (1930).

<sup>241</sup> If those mechanisms were the vehicles for suppressing law reform, perhaps the NLAO's influence may have magnified the effects. The most graphic example of this possibility is illustrated by one of the five additional questions submitted to the Standing Committee. It asked the Standing Committee "How should the responsibility of the organized Bar for the supervision and conduct of legal aid organizations be expressed in the formation of legal aid organizations?" See RECORD OF PROCEEDINGS FOURTH ANNUAL MEETING,

#### IV. WHY THE SHIFT FROM LAW REFORM: FUNDING AND CONTEXT

Both of the theories discussed in the previous section are plausible. It is plausible that the influence of *Justice and the Poor* was conservative and limited the mission of legal aid. It is also plausible that the organized bar exerted control over legal aid and therefore, suppressed, if not eliminated, law reform efforts during the 1920s. However each of these explanations suffers from conflicting evidence. Moreover, they are reductionist. They focus on external factors. They do not explain why legal aid would have followed the conservative parts of Smith in *Justice and the Poor* or allowed itself to be controlled by the ABA or local bar associations. Therefore, two other hypotheses or theories are worth exploring. The first is that legal aid's need for funding led it to conform to its perceptions of what the organized bar would support. The second is that the social and historical context had changed. These additional explanations connect the issues legal aid faced in the 1920s to some of the issues legal services faces today.

##### A. *Funding*

Funding had been a problem for legal aid from the beginning. At the close of the nineteenth century, each of the three legal aid organizations that had been established struggled with financial difficulties.<sup>242</sup> This did not change in the first part of the twentieth century. The records of Boston, Chicago, and New

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*supra* note 237, at 229. However, for two reasons I do not consider this request to be evidence of bar control via the NLAO. First, it does not appear the ABA Standing Committee used this request to establish control over legal aid beyond what I have already discussed. Second, it illustrates more the desires of legal aid to ingratiate itself with the bar than the bar, itself, reaching out to control legal aid. As I discuss in the next section, this desire of legal aid to curry favor with the bar is closely related to its need to seek financial support from the Bar.

<sup>242</sup> SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at 139.

York have constant references to the need for funding and a sense of constant crisis because of the lack of financial support. For example, in Boston, the Eighth Annual Report of the Legal Aid Society states, "We need more money, but notwithstanding demands for increased services we have consistently limited our expenditures so that they shall not exceed our income."<sup>243</sup> The next year, the Society reports that its work "could be largely increased and made more effective if we had more money. Instead of the \$2,500 income that we now have, we need \$5,000 a year."<sup>244</sup> By 1912 the financial situation seems to have improved,<sup>245</sup> but in 1916 the Treasurer reported that there was only \$39.00 in the treasury.<sup>246</sup>

Chicago was no different. As discussed above, the primary motivation for Chicago Legal Aid Society's merger with United Charities was financial.<sup>247</sup> Although the Annual Reports paint a picture of relative financial security in the early years,<sup>248</sup> the years post-1910 were ones of increased financial stress. In 1911 the annual report states the Society faced increased demand without a corresponding increase in contributions.<sup>249</sup> By 1914 the Society had expenses that exceeded income and owed

<sup>243</sup> Eighth Annual Report of the Boston Legal Aid Society 7 (1908).

<sup>244</sup> Ninth Annual Report of the Boston Legal Aid Society 5 (1909).

<sup>245</sup> *Directors' Report* in the Eleventh Annual Report of the Boston Legal Aid Society 5 (1912).

<sup>246</sup> Minutes of Board of Directors Meetings, Boston Legal Aid Society, October 4, 1916 (On File with the Social Law Library, Boston, Ma.).

<sup>247</sup> See *supra*.

<sup>248</sup> The annual report for 1909 praises the Treasurer and Finance Committee for "bringing us through another year with all needed funds raised, all debts paid and a small balance in the treasury." FIFTH ANNUAL REPORT OF THE CHICAGO LEGAL AID SOCIETY FOR THE YEAR 1909 (1910) at 7.

<sup>249</sup> 7TH ANNUAL REPORT OF THE CHICAGO LEGAL AID SOCIETY FOR THE YEAR 1911 (1912) at 11 has a section titled "Need of Increased Expenditures." That section discusses how "the number of applicants is so great that we are obliged to keep many of them waiting a considerable time before they are interviewed." *Id.* It then goes on to discuss how the Society needs to increase funding to meet a "Budget which ought to be not less than fifty per cent. greater than the amount expended during the past year." *Id.* at 12.

money to a bank.<sup>250</sup> By 1916, “the increase in work [has] been disproportionate to the increase in contributions for its support” and for the first time the Society had decreased the number of clients represented than the previous year.<sup>251</sup> Finally, in 1918, the Society’s annual report states, “stated: “the last year has been one of peculiar anxiety for all those interested in the welfare of the Legal Aid Society, owing to the increased difficulty in financing the work . . .”<sup>252</sup> In 1919 the merger with United Charities occurred.

New York had much of the same pattern. According to John Maguire, finances were always a pressing problem.<sup>253</sup> In 1916 Arthur von Briesen, the long-time President to the Society, writes in a letter, “During the forty years of its existence the Legal Aid Society has always found it difficult to meet expenses owing to insufficient financial support.”<sup>254</sup> Other letters from Von Briesen constantly refer to financial problems. For example, Von Briesen 1914 states:

During the last years we have run behind financially, have run into debt. We are beggars of the worst kind, going from house to house, from office

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<sup>250</sup> 9TH ANNUAL REPORT OF THE CHICAGO LEGAL AID SOCIETY FOR THE YEAR 1913 (1914) at 11. The report for the following year expresses even more concern about the imbalance between expenditures and funding. 29TH ANNUAL REPORT OF THE CHICAGO LEGAL AID SOCIETY FOR THE YEAR 1914 (1915) at 9-10.

<sup>251</sup> 30th Annual Report of the Chicago Legal Aid Society for the Year 1915 (1916) at 9-11.

<sup>252</sup> 33rd Annual Report of the Chicago Legal Aid Society for the Year 1918 at 13.

<sup>253</sup> MAGUIRE, *supra* note 18, at 197. See also DAVIS, *supra* note 9, at 11 “Von Briesen’s tenure at the society [New York] was marked by dogged fundraising.”

<sup>254</sup> Letter from Arthur von Briesen to J. Hampden Dougherty, Jr. February 4, 1916, Box 5, Arthur von Briesen Papers, Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library.

to office seeking contributions to enable us to do the great work[,] which we have undertaken.<sup>255</sup>

In 1919, a Committee of Association of the Bar of New York notes that the financial support that the Legal Aid Society has received is “far below what it should be.”<sup>256</sup> That year, expenses exceeded revenues by \$4,075.<sup>257</sup>

Funding problems for legal aid continued into the 1920s. In Boston, the Legal Aid Society’s treasurer reported that in 1925, the financial situation of the Society was serious and that it had on deposit approximately \$900 to meet a payroll of approximately \$1600.<sup>258</sup> In 1926 the President of the Legal Aid Society noted that the Society had expected contributions of \$25,000, but instead had only received \$20,000. The result was that its bank had advised him it would not renew its loan unless one or more of its Directors became obligated on the loan.<sup>259</sup> The 1922 Annual Report for the New York Legal Aid Society stated, “the Society is greatly in need of more income” and that its “resources are not sufficient to meet our present annual budg-

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<sup>255</sup> Letter from Arthur von Briesen to Star J. Murphy Esq., May 13, 1914, Box 7, von Briesen Papers, *supra* note 254. Similar sentiments are found in other letters from Von Briesen. See Letter from Arthur Von Briesen to Robert W. Deforest October 4, 1912, Box 6, von Briesen Papers, *supra* note 254. (The Legal aid Society . . . is total devoid of funds. There is not a dollar in the treasury . . .); Letter from Arthur von Briesen to Jon S. Lyel, Esq. October 23, 1911 Box 7, von Briesen Papers, *supra* note 254. (“Naturally we are always short of money”.)

<sup>256</sup> *Report of the Special Committee of the Association of the Bar Re Legal Aid Work* (May 31, 1919) reprinted in 17 LEGAL AID REVIEW No. 3, p. 5 (July, 1919) at 6.

<sup>257</sup> Forty-Fourth Annual Report of the Legal Aid Society of New York for the Year 1919 (1920) at 15.

<sup>258</sup> Minutes of Boston Legal Aid Society, October 22, 1925 (on file at the Social Law Library, Boston, Ma).

<sup>259</sup> Minutes of Boston Legal Aid Society, December 8, 1926 (on file at the Social Law Library, Boston, Ma). See also President’s Report, 1922 ANNUAL REPORT OF THE BOSTON LEGAL AID SOCIETY 2 (1922) (“at the present time adequate financial support seems to be the paramount necessity.”)

ets.”<sup>260</sup> In 1924, the need of society for more income was pressing.<sup>261</sup> Similar sentiments are found in annual reports of the New York Legal Aid Society during the 1920s.<sup>262</sup>

It is harder to document the financial situation of legal aid in Chicago during the 1920s because its financial reports were part of the overall annual report for United Charities. By 1924 United Charities was in financial difficulty: “income fell considerably short of the year’s budget” and bank loans had to be taken out to meet the deficit.<sup>263</sup> We do not know to what extent legal aid contributed to that deficit. However, we do know that it was at least partially responsible. In 1926, United Charities published a special report devoted to the Legal Aid Bureau. That report states, “[t]he Legal Aid Bureau has never passed a year without a deficit.”<sup>264</sup>

As discussed above, these funding difficulties were not new. What changed in the 1920s was that, although appeals to the bar were always on legal aid’s agenda, the bar was now perceived by legal aid as the primary answer to its funding difficulties. This tie between the bar and financial support was most explicit in Chicago. When United Charities entered into its agreement to have the policies of the Legal Aid Bureau determined by a joint committee of United Charities and the Legal Aid Committee of the

<sup>260</sup> Forty-Seventh Report of the President, Treasurer and Attorneys of the Legal Aid Society for the Year 1922, 5 (1923).

<sup>261</sup> Forty-Ninth Report of the President, Treasurer and Attorneys of the Legal Aid Society for the Year 1924, 7 (1925).

<sup>262</sup> FIFTIETH REPORT, *supra* note 130 at 9 reporting the depressing fact that last year expenditures exceeded income.” FIFTY-SECOND REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY FOR THE YEAR 1927, 9 (1928) (need funds to meet increase in expenses.) FIFTY-FOURTH REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY FOR THE YEAR 1929, 6 (1930) (“hampered by lack of sufficient funds”).

<sup>263</sup> United Charities of Chicago, Highlights of the Work Done by United Charities of Chicago in Behalf of the Unfortunate and Needy (October 1, 1923-September 30, 1924) at 3.

<sup>264</sup> United Charities of Chicago, The Legal Aid Bureau’s Service: The Poor Man’s Law Office 5 (1927)



Chicago Bar Association, the Bar Association agreed to attempt to raise funds covering the salaries of the attorneys, and one clerk and one stenographer.<sup>265</sup>

In New York, although the relationship was not made formal, as the Legal Aid Society increased its ties with the bar, it appointed a Special Committee on Finance who worked with special Finance Committees of the Bar to raise significantly more money from members of the bar.<sup>266</sup> The 1928 Report by the Association of the Bar of New York also recommends closer ties between the bar and legal aid, including the recommendation that “[l]egal aid should seek the advice of the organized bar.”<sup>267</sup> However, why would legal aid follow this recommendation to seek the advice of the bar? The answer again lies with legal aid’s need for financial support. The recommendation comes in a section about how to get increased financial support from the bar.<sup>268</sup> It expresses a *quid pro quo*—in exchange for more bar association involvement and perhaps control, the bar may be more willing to give financial support.

We have little data about Boston’s formal relationship with the Boston Bar because there was no Boston Bar Association legal aid committee.<sup>269</sup> A history of the Boston Bar Association states by 1916, in exchange for the Legal Aid Society investigating misconduct of the bar at “the lower reaches of the profession, “the Bar Association began providing legal aid with

<sup>265</sup> SIXTY SIX YEARS OF SERVICE, *supra* note 103, at 49-50.

<sup>266</sup> RECORD OF PROCEEDINGS AT THE FIRST ANNUAL MEETING OF THE NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS 58-59 (1923). See also *Presidents Report*, FORTY-SEVENTH REPORT, *supra* note 260 at 6 (Recognizing need for a greater amount of support from the Bar and to that end the Finance Committee will make greater efforts to solicit support from members of the Bar).

<sup>267</sup> See *supra* note 227.

<sup>268</sup> *Id.*

<sup>269</sup> See *supra* note 217. The lack of a formal relationship is somewhat paradoxical since from the beginning the Boston Legal Aid Society perceived itself as a lawyer’s law office because it was founded by members of the Boston Bar. See Spiegel, *supra* note 11, at 21-22.

financial assistance.<sup>270</sup> However, there is no documentation or evidence offered for this conclusion. We do know that Boston had serious funding difficulties during the 1920s,<sup>271</sup> and in 1925 Arthur Hill, the President of the Society, presented a proposal at a Board of Directors meeting to deal with the current financial crisis by raising \$6000 from members of the bar.<sup>272</sup> It also put a notice in its annual reports during the 1920s where it appealed to the legal profession to remember the Legal Aid Society “when clients who are drawing wills ask for advice regarding charities which are in need of bequests.”<sup>273</sup> However, at the same time, Boston seemed to resist special reliance on the bar. Its annual report for 1920 stated:

The Boston Legal Aid Society cannot ask for its entire support from the Bar for the same reason hospitals cannot ask for support from doctors alone. The Legal Aid Society is an organization[,] which performs a public service, and should obtain support from every class in the community.<sup>274</sup>

Given this contradictory evidence, it is hard to draw firm conclusions about the Boston Legal Aid Society establishing a closer relationship with the bar during the 1920s in order to obtain additional funding.

Nevertheless, the dominant direction of legal aid during the 1920s was to establish closer relationships with the bar and to equate that relationship with funding. The reports of the National Association of Legal Aid Organizations show this connection between a closer relationship with the bar and legal aid’s need for funding. At the first Annual Meeting in 1923, the Committee on Relations with the Bar reported that relations be-

<sup>270</sup> Douglas Lamar Jones, Alan Rogers, Cynthia Farr Brown, James J. Connolly & Diane Kadzis, *Discovering the Public Interest* 74 (1993).

<sup>271</sup> See *supra* notes 258-259.

<sup>272</sup> Minutes, *supra* note 258.

<sup>273</sup> Twenty Fourth Report of the Boston Legal Aid Society 4 (1924). See also Twenty Fifth Annual Report of the Boston Legal Aid Society 4 (1925).

<sup>274</sup> TWENTIETH ANNUAL REPORT *supra* note 117, at 11.

tween legal aid societies and the bar “were not as satisfactory as desired.”<sup>275</sup> Almost immediately, the discussion that followed turned to obtaining additional financial support from the bar.<sup>276</sup> Similarly, after the 1925 Report from the Committee on Relations with the Bar, John Bradway stated that in connection with the Bar Association Activities being discussed, the discussants should look to the report from the Committee on Financial Accounting because it would show the organizations that receive financial support from the bar. The ensuing discussion then turned to how legal aid organizations might obtain financial support from the bar.

The ABA Standing Committee on Legal Aid also linked legal aid’s relationship with the bar and funding. In its 1922 Report, the Standing Committee began with stating, “[t]he success of legal aid work in the United States depends upon the active support of the organized bar.”<sup>277</sup> It then set out what it called practical recommendations, including recommending that local bar Associations set up legal aid committees which inspect and report on the legal aid organization.<sup>278</sup> These Committees, however, should not only exercise some oversight function, but as part of its responsibilities, the legal aid committees should assist in raising money, particularly from members of the bar.<sup>279</sup>

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<sup>275</sup> RECORD OF PROCEEDINGS, *supra* note 142, at 57.

<sup>276</sup> *Id.* at 58.

<sup>277</sup> Report of the Forty-Fifth Annual Meeting of the American Bar Association 402 (1922).

<sup>278</sup> *Id.* at 408-09.

<sup>279</sup> *Id.* at 409. See also Reginald H. Smith and John S. Bradway, *Legal Aid and the Bar*, 5 TENN. L. REV. 223, 223 (1926-1927). (“The relationship between legal aid to poor persons and the legal profession is simple and clear. The legal aid organizations are the agents of the bar and they are accordingly entitled to receive from the bar leadership and direction, moral and financial support.”); Forrest C. Donnell, *What Can The Bar Do for Legal Aid*, 20 LEGAL AID REVIEW NO. 2 10, 12 (1922) (“the efforts of the Bar can be directed in large part to the solicitation of financial support both from its own members and from the general public”). Donnell was one of the original members of the ABA Standing Committee on Legal Aid. Bradway, *supra* note 184, at 13.

Given this perception that the bar could and should be a major source of its funding,<sup>280</sup> the behavior legal aid exhibited is what one might expect of not-for-profit organizations that seek funding. It conformed its work to the expectations of its donors. Some of the evidence of this behavior is that legal aid societies consistently developed rules that prevented them from taking cases that might compete with the bar.<sup>281</sup> At times there was debate about where the boundary might be drawn between cases that should be legal aid cases and cases that “belonged” to the bar,<sup>282</sup> but the principle was consistent—legal aid should avoid competition with the bar. As the National Association’s Committee on Relations with the Bar stated, “Legal Aid Societies make a distinct effort to obtain co-operation of the bar by

<sup>280</sup> Reliance on the bar for funding also resulted from the sense that alternatives to bar funding presented more difficulties. Smith in *JUSTICE AND THE POOR* discussed some of the alternative sources of funding. SMITH, *JUSTICE AND THE POOR*, *supra* note 1313, at 195. Smith was ambivalent about turning to the prime competitor to bar funding, municipally funded legal aid. In the 15th Annual Report of the Boston Legal Aid Society he discusses the concerns that such societies would be prone to corruption and inefficiency, although he does say developments in the West are more hopeful. Reginald Heber Smith, *The Position of the Legal Aid Society in the Administration of Justice* (reprinted from the 15th Annual Report of the Boston Legal Aid Society), 1 Mass. Law Quarterly 173, 182 (1916). In *Justice and the Poor* his focus is on the bar as the chief source of funding. SMITH, *JUSTICE AND THE POOR*, *supra* note 1313, at 237. Although one can criticize this reluctance to turn to the bar rather than governmental sources of funding, in some ways it was prescient. The history of the Legal Services Corporation shows that government funding can result in restrictions. See *supra* note 6 for a list of current restrictions.

<sup>281</sup> See SMITH, *JUSTICE AND THE POOR*, *supra* note 13, at 157, discussing the majority rule of legal aid societies is not to accept personal injury cases. He goes on to discuss how making a decision about such cases puts two principles in conflict: (1) legal aid societies should assist the poor; and (2) they should not compete with the bar. *Id.* at 158.

<sup>282</sup> Two of the five questions submitted by the National Association’s Committee on Relation with the Bar to the ABA Standing Committee on Legal Aid concerned this boundary. One question was who is a legal aid client and who should be referred to private lawyers; another was should legal aid lawyers take personal injury cases that private lawyers might take on a contingent fee basis. See *supra* note 196.

explaining their work . . . [and] by showing that the Legal Aid Society is not interfering with their work.”<sup>283</sup>

Contemporary studies demonstrate the influence of funding on behavior of legal services organizations. Catherine Albiston and Laura Nielson have recently conducted a study looking at the impact of funding on the work of public interest law organizations (PILOs).<sup>284</sup> As they state, “[t]here is reason to believe that the funding structures of PILOs affect not only their viability but also their strategies . . .”<sup>285</sup> In studying this hypothesis, they contacted a sample of PILOs and asked whether their funding came with restrictions, whether those restrictions affected their activities, and, if so, how those restrictions affected their activities.<sup>286</sup> They found that 72 percent of the organizations accepted funding with restrictions,<sup>287</sup> and that such restrictions had significant impact upon the organizations’ activities.<sup>288</sup>

There are, however, important questions about whether this conclusion applies to this study.<sup>289</sup> The question Albiston and

<sup>283</sup> See REPORT OF PROCEEDINGS, *supra* note 142, at 57.

<sup>284</sup> Catherine R. Albiston and Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOCIAL INQUIRY 62 (2014).

<sup>285</sup> *Id.* See also Cummings & Rhode, *Public Interest Litigation*, *supra* note 20, at 605. (“money matters: how public interest law is financed affects the kinds of cases that can be pursued and their likely social impact.”); Cummings, *The Pursuit of Legal Rights*, *supra* note 8, at 544 (2012) (discussing how funding constrains practice choices of public interest lawyers).

<sup>286</sup> Albiston & Nielson, *supra* note 284, at 83.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 86. Compare Deborah Rhode, *The Public Interest Law Movement At Mid-Life*, 60 STAN. L. REV. 2027, 2052 (2008) (leaders of PILO claim funders only have limited impact, although public interest lawyers “did their best to fit their priorities into foundations pigeon holes”).

<sup>289</sup> In addition to the issues discussed in the text, there is the question of whether their conclusion would apply to legal aid organizations alone, given that Albiston and Nielson studied a variety of organizations. Although we can’t answer this question definitively, it is likely the answer is yes. About 25 percent of their sample was from LSC-funded organizations. *Id.* at 78. Moreover, the crucial variable they found was not between legal services and other organizations, but between liberal and conservative organizations. *Id.* at 83-

Nielson studied whether funding came with restrictions, and to what extent those restrictions influenced the behavior of PILOs. What they did not look at was the related question of whether a PILO would voluntarily change its practices to conform to the wishes of its donors in order to attract funding. In trying to apply their study to this question, we know that many PILOs, and in particular, legal service organizations did not want to submit to the restrictions imposed upon them. Indeed some legal services organizations have gone as far as refusing federal funding in order to avoid the restrictions that accompany funding.<sup>290</sup> Others have accepted those restrictions. This illustrates that there is an element of organizational choice involved. It also illustrates that organizations will accept restrictions when they perceive they have no other alternative, arguably the situation legal aid found itself in during the 1920s.<sup>291</sup> Therefore, the Albiston and Nielson data is suggestive, even if not conclusive, in supporting the argument that in some circumstances, organizations modify behavior to attract funding even in the absence of explicit restrictions.<sup>292</sup>

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85. Indeed their crucial conclusion that funding can significantly affect activities relied mainly on data about how LSC restrictions affected legal services organizations. *Id.* at 81-83.

<sup>290</sup> See e.g. the statement of Greater Boston Legal Services: "GBLS determines we cannot fulfill our mission if we adhere to these restrictions. We choose to withdraw from receipt of federal LSC funds." Significant Events in GBLS History, Greater Boston Legal Services, <http://www.gbls.org/about/history>. See also Davis S. Udell, *Implications of the Legal Services Struggle For Other Government Grants for Lawyering For the Poor*, 25 Fordham Urb. L.J. 895, 895 (1998); Cummings & Rhode, *supra* note 20, at 620.

<sup>291</sup> See *supra* note 280.

<sup>292</sup> More general studies of not-for-profit organizations support this conclusion that nonprofits modify behavior to attract donors. See Victoria D. Alexander, Environmental Constraints and Organizational Strategies: Complexity, Conflict, and Coping in the Nonprofit Sector, 272, 276 in *PRIVATE ACTION AND THE PUBLIC GOOD* ED. BY WALTER W. POWELL AND ELISABETH S. CLEMENS (1998) (discussing studies of public television which show that nonprofits attempt to please their assumed set of donors).

A second limitation in generalizing from the Albiston-Nielson study is the time difference. Their data is contemporary and raises the question of whether it is applicable to the 1920s. Again it is impossible to give a definitive answer to this question since we do not have comparative data. We do, however, have the examples of conformity to the bar's wishes cited above.<sup>293</sup> Moreover, there is little reason to suppose legal aid would be more resistant to outside influence in the 1920s than it would be today.

A more important timing issue is that if this analysis is correct, why would legal aid not conform to the expectations of the bar during the period 1900-1920? Its funding needs were at least equally severe. To a large extent, it did. Some of the behavior I cited above pre-dated 1920. The question for this article, though, is why did the bar have an influence on legal aid's willingness to engage in law reform in the 1920s? If legal aid needed to conform to the expectations of its potential donors, why was law reform or preventive law on the agenda as a possibility during the years 1900 to 1920? I do not have an easy answer to those questions. One possibility that is supported by the record is that the bar was more receptive to legal aid post-1920 because of its own agenda.<sup>294</sup> To the extent the bar was more receptive, legal aid would respond in kind and be more receptive to the bar. In addition, legal aid post-WWI saw the bar as the major solution to its long standing funding problems and to that extent it would more likely conform itself to the bar's expectations. Legal Aid also had its national organization which could coordinate outreach to the bar and make it more likely to consider the bar's expectations. We can see that in the NLAO's willingness to sub-

<sup>293</sup> See *supra* note 268.

<sup>294</sup> See Reginald Heber Smith & John Saeger Bradway, *Growth of Legal Aid Work in the United States: A Study of Our Administration of Justice, Primarily as it Affects the Wage Earned and of the Agencies Designed to Improve His Position Before the Law*, BULLETIN OF THE U.S. BUREAU OF LABOR STATISTICS No. 398, 99 (1926) (no finer accomplishment post WW1 than cementing relationship between bar and legal aid).

mit key questions about legal aid policy to the ABA Standing Committee on Legal Aid. However, we also need to move beyond materialistic explanations. The period 1900-1920 was different than the 1920s. To complete the picture we also need to look at the social and historical context.

### **B. Context**

The term “context” is subject to a variety of meanings. Martha Minow and Elizabeth Spellman identified three differing usages: (1) the historical and social situation, (2) the “reader or critic who examines texts and understands them” in a different situation than envisioned by the author, and (3) the importance of particular details of a problem.<sup>295</sup> I am using context in their first sense of the phrase—the historical and social situation, but in a different way from Minow and Spellman. They qualify their usage to refer to the situation of “writers and thinkers,”<sup>296</sup> but the term can be equally used to help understand the work of lawyers.

Context for lawyers can be both an opportunity and a constraint.<sup>297</sup> As an opportunity, it can open up possibilities in the areas that were in the past not considered possible.<sup>298</sup> As a constraint, it can affect a lawyer’s sense of what might be achieved

<sup>295</sup> Martha Minow and Elizabeth V. Spellman, *In Context*, 63 S. CAL. L. REV. 1597, 1602-03 (1990).

<sup>296</sup> *Id.* at 1602.

<sup>297</sup> See Mark Neal Aaronson, *Representing The Poor: Legal Advocacy And Welfare Reform During Reagan’s Gubernatorial Years*, 64 HASTINGS L.J. 933, 939 (2013) (“[c]ontext is especially critical in understanding the opportunities and limitations in pursuing strategies for social change, especially the roles undertaken and the choices made by lawyers.”); Steven L. Winter, *Cursing the Darkness*, 48 U. MIAMI L. REV. 1115, 1120 (1994) (“[E]very constraint is also an enablement. The social and political context can also create possibilities for reform through litigation quite beyond those sanctioned or even hinted at by the governing legal standards”) every constraint is also an enablement”).

<sup>298</sup> The campaign for gay marriage is a recent example.



through courts or other means.<sup>299</sup> Context can affect not only what a lawyer sees as possible, but also the lawyer's sense of self or identity. That sense of identity will further define the choices made. Lawyers in the 1960s not only may have seen the Warren Court as more hospitable to social change, but they themselves were shaped by the social and historical context of the 1960s and therefore more willing to engage in such efforts. Moreover, there can be a feedback effect where lawyer's choices legitimize certain legal claims and thereby lead to a context, which can be more favorable to certain lawyering strategies in the future.<sup>300</sup> This is similar to Mary Dudziak's argument that context and law are "mutually constitutive."<sup>301</sup> As she argues in reviewing Michael Klarman's book on *Brown v. Board of Education* the relationship between social context and law is not linear (in either direction), but more of a dialectic where social context affects the choices made by courts and the choices made by courts affect the context.<sup>302</sup>

Assuming that context matters for lawyers, we still have to answer why might the context have been more favorable for law reform or a preventive law sensibility during the period 1900 to pre-WWI than in the 1920s? The short answer is that the earlier period was one of political and social reform. The Progressive movement may have embraced a number of contradictory

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<sup>299</sup> Rhode, *Public Interest*, *supra* note 288, at 2028 as courts have grown more conservative organizations have become more selective in their use of lawsuits and resorted to other tactics. See also Ruth Margaret Buchannan, *Context, Continuity, and Difference In Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1002 (1994) ("The legal arguments and strategies that are the putative "objects" of the study of poverty lawyering cannot be disembedded from their context in the intentions and self-understandings of the agents who deploy these objects. The legal arguments themselves may bear traces of their use from a particular time and place.").

<sup>300</sup> See Weismann, *Shifting Paradigms* at 821 ("National support thus helped to create a legal culture that valued legal services lawyers and their efforts in defense of the poor.") citing Susan Lawrence's work.

<sup>301</sup> Mary L. Dudziak, *The Court And Social Context in Civil Rights History*, 72 U. CHI. L. REV. 429, 444 (2005).

<sup>302</sup> *Id.*

strands.<sup>303</sup> However, it still was a period where reform was advanced on a number of fronts. Legislation regulating railroads, antitrust legislation, labor legislation, a Food and Drug Act and Banking legislation were all passed during the Progressive Era.<sup>304</sup> The motivations for such reform efforts may have been varied, but the spirit of reform was real to the participants.<sup>305</sup>

Moreover, with all its contradictions, the question is not how pure the Progressive era was, but whether it was more conducive to reform than the 1920s. Again as with any era, the 1920s was not a coherent set of ideologies or practices.<sup>306</sup> There was, however, as with the Progressive Era, a dominant strain, and that dominant strain was more conservative and less hospitable to reform than the Progressive Era.<sup>307</sup> Louis Brandeis writing to Felix Frankfurter in 1926 expressed it this way, “We are now passing through the first experience in 50 years of actual retreat in social, political, economic progress as evidenced by legislation. Heretofore we had times of unrest, and reactionary administrations or reactionary public opinion, but never actual retreat.”<sup>308</sup>

The harder question, though, is to what extent this difference in social and historical context affected legal aid. At best, we can

<sup>303</sup> See Daniel T. Rodgers, *In Search of Progressivism*, 10 *Reviews of American History* 113, 114-115 (1982) and SHELDON STROMQUIST, *RE-INVENTING THE PEOPLE: THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM AND THE ORIGINS OF MODERN LIBERALISM* 2-4 (2006).

<sup>304</sup> For a list of legislation passed during the Progressive Era, see Elizabeth Sanders, *Rediscovering the Progressive Era*, 72 *OHIO ST. L.J.* 1281, 1294 (2011).

<sup>305</sup> See Stromquist, *supra* note 303, at 83-106; Daniel J. Goldberg, *Discontented America: The United States in the 1920s* (1999) at 1.

<sup>306</sup> *Id.* at 201 (although there was rightward shift in American Politics during the 1920s “many currents of voluntary reform remained active”).

<sup>307</sup> See generally, GOLDBERG *supra* note 305.

<sup>308</sup> Letter to F.F. (Feb. 26, 1926) (located in the Frankfurter Mss.-LC) Quoted in David W. Levy and Bruce Allen Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 *MICH. L. REV.* 1252, 1280 (1980).

only surmise. However, if we look to lawyers and legal aid in the pre-war era we see tendencies in legal aid mirroring those of the Progressive Movement. The Progressives might have been reformers, but they were not interested in overthrowing the system, but improving it.<sup>309</sup> They were largely middle class reformers who had ambivalence toward the poor and at least some of them embraced the idea of technology and scientific method as means to reform.<sup>310</sup> These contradictions affected lawyers in general, particularly in the drafting of the 1908 Canons of Professional Ethics.<sup>311</sup> They also affected legal aid. Legal aid similarly wanted to reform the system to make it work better. It did not see itself as part of class conflict, but rather part of the effort to improve the legal system so it could achieve its aspirations.<sup>312</sup> It expressed its ambivalence toward the poor in simultaneously proclaiming it was not a charity, but trying to limit its services to the deserving poor.<sup>313</sup> As was discussed with

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<sup>309</sup> STROMQUIST, *supra* note 303, at 4.

<sup>310</sup> On middle class and ambivalence toward the poor, particularly immigrants see STROMQUIST, *supra* note 303, at 7; on efficiency see Rodgers, *supra* note 303, at 126.

<sup>311</sup> See Alfred L. Brophy, Race, Class, And The Regulation of the Legal Profession in the Progressive Era: The Case Of The 1908 Canons, 12 Cornell J.L. & Pub. Pol'y 607 (2003) and Susan D. Carle, Lawyers' Duty To Do Justice: A New Look At The History Of The 1908 Canons, 24 Law & Soc. Inquiry 1 (1999) (both articles relate the 1908 Canons to the Progressive Era and its contradictions).

<sup>312</sup> *Justice and the Poor* is the best known example of this approach. See *supra*.

<sup>313</sup> See Spiegel, *supra* note 11, at 23-24, discussing the Boston Legal Aid Society's ambivalent stance toward the question of whether legal services was a right or a charity. Arthur von Briesen the long-time President of the Legal Aid Society of New York strenuously objected to legal aid being considered a charity, but the same time the Society screened claims for worthiness. See Rule 23 governing the work of attorneys:

Where it appears either from the admission of the applicant or from some other reliable source that the applicant has been guilty of theft or dishonesty or thorough misconduct in immediate connection with the transaction out of which such claim arises, or in relation to the defendant, then the claim of such applicant may be refused by the Attorney-in Chief or the Assistant Attorney.

Smith, there was an element of legal aid emphasizing technocratic improvements in the service of reform.<sup>314</sup> The law reform efforts of settlement houses similarly had their roots in Progressive era politics.<sup>315</sup>

Direct evidence that in the 1920s legal aid adopted some of the characteristics of that era, other than the abandonment of reform efforts, is harder to find, except in Boston. The 1920s was ushered in by Red Scare of 1919 and paranoia about Bolsheviks in the 1920s. Although anti-immigrant sentiment was hardly new, it intensified in the 1920s.<sup>316</sup> In 1921, there was the passage of Emergency Immigration Act<sup>317</sup> and, in 1924, the National Origins Act.<sup>318</sup> Legal aid always claimed that one reason for supporting it was that it helped to Americanize immigrants.<sup>319</sup> In the 1920s, however, the Boston Legal Aid Society started keep-

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Reprinted under the heading "Unworthy Clients" in the THIRTY-SEVENTH ANNUAL REPORT OF THE PRESIDENT, TREASURER AND ATTORNEYS OF THE LEGAL AID SOCIETY FOR THE YEAR 1912, 25 (1913). See also 1 Legal Aid Review No. 3 at 1 (1903) ("Legal Aid Society acts only when investigation shows a case is deserving").

<sup>314</sup> See *supra* page .

<sup>315</sup> See DAVIS, *supra* note 9, at 14 ("[A]s settlement house residents moved into the arena of Progressive politics, law reform became a significant part of their work.")

<sup>316</sup> GOLDBERG *supra* note 305, at 140-166.

<sup>317</sup> Act of May 19, 1921, ch. 8, § 2, 42 Stat. 5.

<sup>318</sup> The National Origins Act established a quota system that tied immigration from each foreign land to its share of the existing United States population. Act of May 26, 1924, ch. 190, § 11, 43 Stat. 153, 159-60.

<sup>319</sup> A particularly vivid example of this is illustrated by a fundraising plea placed in the Legal Aid Review by Allen Wardell, Treasurer of the New York Legal Aid Society where he states: "The foreigner, ignorant of our language and customs without money to pay for counsel to assert his rights, may become a dangerous citizen." Wardell concludes with a plea for funding. Allen Wardell *"Justice is More Important than Charity"*, 13 Legal Aid Review No. 4, 5 (1915). See also SMITH, JUSTICE AND THE POOR, *supra* note 1313, at 11 (when an immigrant finds himself wronged "he becomes easily subject to the influences of sedition and disorder."); Draft "The Legal Aid Societies" by "One Who Knows" in Arthur von Briesen Papers, Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library. At p. 2 this draft states "But, by far, the greatest object of this work is

ing statistics about how many of its clients are foreign born for the first time. It also devoted part of an annual report to a section on Americanization and the Law.<sup>320</sup> An even more vivid example of the increased prominence Boston gave to Americanization in the 1920s was the issuance of a fundraising pamphlet: *Luigi and the Law's Delay*.<sup>321</sup> This pamphlet describes a fictional, but allegedly typical, case of an Italian immigrant being hounded by a furniture dealer. Luigi first finds his way to an unscrupulous lawyer, but ultimately makes it to the Legal Aid Society, which helps him resolve his troubles. A potential Bolshevik and anarchist was calmed down and shown the American way.

Unfortunately, similar evidence is lacking in the New York and Chicago annual reports from the 1920s. We do have some circumstantial evidence linking legal aid and an increased focus on immigrants and Americanization during the 1920s. Charles Evans Hughes' 1920 speech to the ABA about legal aid starts off with homage to the need of legal aid to be in the service of Americanization. He connects legal aid and remedying injustice in the court system to the need to foster acceptance of American institutions.<sup>322</sup> In 1922, the NLAO Committee on Records recommended that among the data that should be kept is statistics about country of origin and immigration status.<sup>323</sup> Allen Wardell, Treasurer and later President of the New York Legal Aid Society, wrote in 1919 of the need of legal aid to share in the work of Americanization, and that helping to obtain justice for

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to be found . . . in its effort to prevent the spreading of anarchism." The content of this draft points to von Briesen as the author.

<sup>320</sup> See *supra* notes 125-126.

<sup>321</sup> BOSTON LEGAL AID SOCIETY, *LUIGI AND THE LAW'S DELAY* (1923) (on file with Social Law Library). The story begins with: "The man was certainly an incipient anarchist." It goes on to describe Luigi as somebody who not only has the handicap of his language, but also "the confusion of fundamental ignorance."

<sup>322</sup> See Hughes, *supra* note 189.

<sup>323</sup> Record of Proceedings Atat the First Annual Meeting of the National Association, *supra* note 142, at 129.

the foreign born will go “far to eliminate one of the causes of unrest.”<sup>324</sup> None of this evidence necessarily means that legal aid organizations changed their behavior to conform to the 1920s increased emphasis on Americanization.<sup>325</sup>

There is, however, strong evidence from more recent times about the relationship between public interest lawyering, of which legal aid is a part, and the historical and social context. Deborah Rhode’s survey of public interest legal organizations concludes that the narrowing of goals in response to the conservative social and legal climate is “the most significant change in public interest work over the last quarter century.”<sup>326</sup> She further concludes that poverty organizations were among those most affected.<sup>327</sup> Her study confirms the theoretical observations of Ruth Buchanan that as contexts change, so do the practices of poverty lawyers.<sup>328</sup> It may be self-evident to say that “legal services will more likely flourish in a climate of social and political activism,”<sup>329</sup> but it is a point worth making time and time again because it is critical to an understanding of legal practice and particularly lawyering aimed at social change.

More anecdotal studies support this relationship. Mathew Diller, reviewing Martha Davis’ book about welfare reform litigation, concludes that it illustrates that initially “poverty lawyers possessed the energy and optimism that accompanies a new en-

<sup>324</sup> Allen Wardell, “Bolshevism” in the United States, 17 *LEGAL AID REVIEW* No. 2 (April, 1919) 1, 3.

<sup>325</sup> One explanation for the lack of direct evidence might be that legal aid saw itself as already doing its part in “Americanizing” immigrants. See *supra* note 319.

<sup>326</sup> Rhode, *supra* note 288, at 2037.

<sup>327</sup> *Id.* at 2038.

<sup>328</sup> Buchanan *supra* note 299, at 1049. See Gary Bellow reflecting on his life-long work as a poverty lawyer stating: “The process of linking strategy to political vision always requires adaptation and a detailed understanding of particular contexts for its effectiveness.” Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 *HARV. C.R.-C.L. L. REV.* 297, 306 (1996).

<sup>329</sup> Scheingold, *supra* note 4, at 891-92.

terprise” and “the participants believed that the potential for fundamental social change existed.” Later, poverty lawyers “came of age in an era in which the possibilities for broad-based social change appear to be far more limited” and consequently were skeptical “that legal representation could play a major role in ending poverty in America.”<sup>330</sup>

It is possible that current times are sufficiently different than the period I have discussed—1900 to 1930—that we cannot rely on this contemporary evidence, but not probable. Moreover, in arguing that context mattered in explaining the shift away from law reform by legal aid in the 1920s, I am not claiming that it was the only thing that mattered. The arguments that the ABA, Smith and *Justice and the Poor* mattered are not wrong, but incomplete. Funding, as I have argued, was a critical variable. Context completes the picture.

### CONCLUSION

This article has shown that there was a different approach to legal aid pre-1920s. It may have gone under the label preventive law rather than law reform or cause lawyering, and it may have emphasized legislative reform more than test cases, but it was concerned with something more than individual one-to-one client representation. Post WWI, in the 1920s, things changed, and that change persisted roughly to the mid-1960s. I have argued that although the conventional explanations for this change—the ABA and Smith and *Justice and the Poor*—may have been significant, they ignore important factors: the need for funding and the change in social and historical context.

History is, of course, too complicated to attribute change to one or several causes or even to know what was cause and what was effect. Nevertheless, this history supports the conclusion of contemporary observers “that a deeper understanding of finan-

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<sup>330</sup> Mathew Diller, *Poverty Lawyering in The Golden Age*, 93 MICH. L. REV. 1401, 1418 (1995).

cial constraints and opportunities in different practice contexts is . . . critical to effective reform.”<sup>331</sup> Furthermore, it illustrates, as Richard Abel has argued, that the delivery of legal services cannot escape politics.<sup>332</sup> Advocates of legal aid in the founding era may have thought that relying on the private bar may have freed them from the influence of politics, but seeking private funding comes with its own set of “politics.” On the other hand, the modern experience with federally funded legal services illustrates that there may be no such thing as an independent source of funding. Moreover, if context matters, then politics matters; there may be better and worse times for reform.

Of course, even with secure funding and a more favorable social and historical context, law reform can only do so much in achieving real political reform. That, however, is another story. This story attempts to reclaim a part of our past that illustrates some of the conditions that are necessary for even putting reform on the agenda. Awareness of that past and the differences between it and today can help inform the continuing debate and struggle about the possibilities of legal services not only providing access to court, but some measure of contribution to reform.

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<sup>331</sup> Scott L. Cummings and Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L. J. 603, 605 (2009).

<sup>332</sup> Abel, *supra* note 4.



